TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 220.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND

vs.

THE L. BUCKI & SON LUMBER COMPANY.

ON WRIT AND CROSS-WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI FILED JANUARY 10, 1908.

CROSS-PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 3, 1908.

WRIT OF CERTIORARI AND RETURN FILED FEBRUARY 6, 1908.

(16,866.)

23509

(18,366.)

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INDEX.

	Original.	Print.
Caption to transcript in case of L. Bucki & Son Lumber Company, plaintiff in error, vs. The Fidelity and Deposit Company of Maryland, No. 925, in United States circuit court of appeals	a	1
Transcript from circuit court of the United States for the southern district of Florida	1	1
Transcript from State court	1	1
Præcipe for summons	1	1
Summons and return	2	2
Præcipe for appearance	3	3
Declaration	3	3
Petition for removal of cause to United States court	15	13
Bond for removal of cause to United States court	16	15
Order for removal of cause to United States court	18	16
Clerk's certificate	18	16
Amendment to declaration	19	16
Motion to strike various allegations from declaration	19	17
Motion to require plaintiff to file bill of particulars	21	18
Order upon demurrer and motion to strike	21	18
Bill of particulars and notice of offer of proof	22	19
Amendment to declaration	24	21

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 30, 1902.

	Original.	Print
Motion to set aside order striking allegations from declaration	26	23
Amendment to bill of particulars	27	23
Plea of *non damnificatus*	27	24
Joinder of issue upon plea of *non damnificatus*	28	25
Amendment to bill of particulars	28	25
Notice of offer of proof of damages	29	25
Order on motion to restore certain portions of declaration	31	27
Verdict	32	28
Assignment of errors	32	28
Writ of error bond	54	45
Bill of exceptions	55	46
Return of sheriff on writ of attachment	55	46
Return of sheriff on writ of attachment	56	47
Motion to dissolve attachment	57	48
Order dissolving attachment	59	49
Second motion to dissolve attachment	59	50
Order dissolving attachment	61	51
Motion for separate trial of motion to dissolve attachment	61	51
Order granting motion for separate hearing of motion to dissolve attachment, and hearing on merits	64	54
Writ of error	64	54
Writ of error bond	65	55
Judgment of United States circuit court of appeals	66	56
Writ of error	67	56
Writ of error and supersedeas bond	68	57
Judgment, United States circuit court of appeals	70	59
Forthcoming bond	70	60
Forthcoming bond	72	61
Indemnity bond	73	62
Indemnity bond	74	63
Mortgage by Bucki Lumber Co. to Fidelity & Deposit Co. and release thereof	74	63
Testimony of Arthur Meigs for defendant	82	70
D. G. Ambler for plaintiff	83	71
Contract between plaintiff and J. N. C. Stockton	86	73
Testimony of Alfred J. Rothero for defendant	91	77
D. U. Fletcher for defendant	94	80
Thos. V. Cashen for defendant	94	80
M. D. Barber for defendant	94	81
Henry Clark for defendant	95	81
Arthur Meigs for defendant	95	81
Daniel G. Ambler for defendant	95	81
H. S. Mitchell	96	82
Chas. L. Bucki	97	83
Letter, Arthur Meigs to C. L. Bucki	98	84
Testimony of H. W. Simmons for defendant	101	86
J. B. Murphree for defendant	102	87
Arthur Stevens for plaintiff	102	87
Settlements between plaintiff and defendant	103	[illegible]
Testimony of B. H. Barnett for defendant	104	
J. N. C. Stockton for defendant	105	

	Original.	Print
Contract between Ambler Lumber Co. and C. L. Bucki.	105	90
Defendant's motion to withdraw testimony from jury.	112	96
Order of court on above motion	114	98
Opinion of court on said motion	115	98
Plaintiff's motion to discharge jury and continue case.	117	100
Charges requested by plaintiff refused or modified	119	102
Charges given by the court	129	110
Charges requested by plaintiff refused	131	112
Testimony of Jas. T. Glen for plaintiff	133	114
Charge requested by plaintiff refused	134	114
Charge given by the court	134	114
Verdict	135	116
Judge's certificate to bill of exceptions	136	116
Writ of error bond	136	117
Citation	137	117
Certificate of clerk	138	118
Argued and submitted	139	118
Judgment	139	119
Petition for rehearing	141	119
Order denying rehearing	145	122
Opinion of the court	145	122
Dissenting opinion	158	132
Certificate of clerk	171	142
Caption to transcript in case of The Fidelity and Deposit Company of Maryland, plaintiff in error, *vs.* L. Bucki & Son Lumber Co., No. 926, in United States circuit court of appeals	a	143
Transcript from circuit court of the United States for the southern district of Florida	1	143
Transcript of record from State court	1	143
Præcipe for summons	1	143
Summons and return	2	144
Præcipe for appearance	3	145
Declaration	3	145
Petition for removal to United States court	15	155
Bond for removal to United States court	16	157
Order for removal to United States court	18	158
Clerk's certificate	18	158
Amendment to declaration	19	159
Motion to strike certain allegations from declaration and bill of particulars	19	159
Order upon demurrer and motion to strike allegations, &c.	21	161
Bill of particulars	22	161
Amendment of declaration	24	164
Motion to set aside order to strike allegations, &c	26	165
Amendment to bill of particulars	27	166
Plea to first count of declaration	27	166
Plea of *non damnificatus*	28	167
Order sustaining demurrer to amended plea to declaration.	29	168
Joinder of issue upon plea of *non damnificatus*	30	168
Amendment to bill of particulars	30	169
Notice of offer of proof of damages	31	169
Order on motion to restore certain allegations, &c., stricken.	33	171
Verdict	33	171

	Original.	Print
Assignment of errors	34	172
Bill of exceptions	42	179
Traverse of allegations of declaration	43	180
Charges given by the court	54	189
Order of court including testimony in regard to profits.	58	189
Charge requested by defendant refused	58	193
Charge given by the court	60	193
Charges requested by defendant refused	60	194
Indemnity bond	62	195
Indemnity bond	63	196
Forthcoming bond	64	197
Forthcoming bond	65	198
Charges given by the court	68	202
Judge's certificate to bill of exceptions	73	205
Supersedeas bond	73	205
Application for writ of error and allowance of same	75	206
Writ of error	76	207
Citation	77	208
Certificate of clerk	78	209
Argued and submitted	79	209
Judgment	79	209
Stipulation for addition to record	80	210
Judgment in United States circuit court	80	210
Note as to opinion, &c	82	211
Clerk's certificate	83	211
Writ of certiorari	84	211
Return on writ of certiorari	86	212

a *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1900, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Error,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant in Error.

Be it remembered that heretofore to wit, on the 30th day of March, 1900, a transcript of the record from the circuit court of the United States for the southern district of Florida was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following, to wit:

1 United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER CO.
versus
FIDELITY AND DEPOSIT CO.

Transcript from State court.

Præcipe for Summons.

In the Circuit Court, Fourth Judicial —, in and for Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation Organized and Existing under the Laws of the State of New Jersey, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation Organized and Existing under the Laws of the State of Maryland, Defendants.

Action on attachment bond; damages, $200,000.

To P. D. Cassidey, clerk of said court:

You will please summons *ad res.* in the above-entitled cause, returnable according to law.

H. BISBEE,
Att'y for Plaintiff.

(Indorsed:) Filed March 25, 1898. P. D. Cassidey, cl'k, by C. W. Frazier, D. C.

2 *Summons ad Respondendum.*

The State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to summons Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, if *he* be found in your county, to be and appear before the judge of our circuit court for the fourth judicial circuit of the State of Florida, at the clerk's office in Jacksonville, on the first Monday of May, next, at a court to be held on that day, in and for the county of Duval, then and there to answer L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, in an action on attachment bond, damages 200,000 dollars. And have then and there this writ.

Witness P. D. Cassidey, clerk of our said court, and the seal of the said court at the court-house in Jacksonville, county aforesaid, this 25th day of March, A. D. 1898.

P. D. CASSIDEY, *Clerk*,
By C. W. FRAZIER,
Deputy Clerk.

H. BISBEE,
Attorney for Plaintiff.

(*Sheriff's Return Endorsed on said Summons.*)

Received this summons on the 25th day of March, A. D. 1898 and executed the same on the 26th day of March, A. D. 1898, in the county of Duval, Florida, by delivering a true copy thereof to R. Bowen Daniel as the resident general agent of the within-named defendant corporation, to wit: Fidelity and Deposit Company of Maryland—at the same time showing the original and making known the contents thereof. Not being able to find the president or vice-president, or other head of said corporation, or the cashier or treasurer, or secretary or general manager, or any of its directors service was made as above.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. BISHOP,
Deputy Sheriff.

(Indorsed:) Filed Mar. 30, 1898. P. D. Cassidey, clerk, c't ct.

3 *Præcipe for Appearance.*

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

L. BUCKI & SON LUMBER COMPANY, a Corpor'n,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corpor'n.

The clerk of the circuit court of Duval county, Florida, will please enter my appearance for the defendant in the above-stated cause.

R. H. LIGGETT,
Att'y for Def't.

(Indorsed:) Filed May 2, 1898. P. D. Cassidey, clerk c't ct.

Declaration.

In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

L. Bucki & Son Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, plaintiff, sues The Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, defendant, for that heretofore, to wit: on the first day of October, 1897, the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, did institute its suit in the circuit court of Florida, fourth judicial circuit, in and for Duval county, against the plaintiff herein, and then and there, by its agent, Frank H. Elmore, who was then and there a clerk in the employ of the said The Atlantic Lumber Company, make and verify under oath, an affidavit in the words and figures following, to wit:

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

THE ATLANTIC LUMBER COMPANY, a Corp'n,
vs.
L. BUCKI & SON LUMBER COMPANY, a Corp'n.

4 STATE OF FLORIDA,
Duval County.

Be it remembered, that on this the 1st day of October, 1897, in the ounty of Duval and State of Florida, before the undersigned, per- nally came Frank H. Elmore, who made oath that he is the duly ..norized agent of the Atlantic Lumber Company for the purpose making this affidavit, and that the said The Atlantic Lumber

Company is a corporation existing under the laws of the State of Florida; that the L. Bucki and Son Lumber Company is a corporation existing under the laws of the State of New Jersey, and resides beyond the limits of the State of Florida; that the said L. Bucki and Son Lumber Company is indebted to the said The Atlantic Lumber Company, in the sum of $9,980.80, and that the same is actually due; and that the said L. Bucki and Son Lumber Company owns and possesses a large number of logs and a great quantity of timber and lumber situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, and that the said The Atlantic Lumber Company has a statutory lien upon all of the said logs, timber and lumber, belonging to the said L. Bucki and Son Lumber Company, and has this day commenced a suit in the circuit court of the State of Florida, for the fourth judicial circuit, in and for the county of Duval, for the purpose of enforcing the said lien; and that the said property will be removed beyond the jurisdiction of the circuit court for the fourth judicial circuit of Florida, in and for the said county of Duval; and that the said The Atlantic Lumber Company, has reason to believe that the said logs, timber and lumber are about to be removed from Duval county, Florida, in which they are now situated; and that the said L. Bucki and Son Lumber Company is about to remove its property out of the State of Florida.

FRANK H. ELMORE.

Sworn to and subscribed before me, this 1st day of October, 1897.

P. D. CASSIDEY,
[SEAL.] *Clerk Circuit Court,*
By H. J. CASSIDEY,
Deputy Clerk.

And on the 1st day of October, 1897, the defendant, The Fidelity & Deposit Company of Maryland, for the purpose of securing the plaintiff against all costs and damages which said plaintiff might sustain in consequence of the improper suing out of a writ of attachment in said action against the goods and chattels, lands and tenements of the said plaintiff for the sum mentioned in said affidavit, to wit: nine thousand nine hundred and eighty dollars and eighty cents, by the said The Atlantic Lumber Company, did make
5 and enter into its certain writing obligatory, under the corporate seal of said defendant company, which said writing obligatory was in the words and figures following, to wit:

Know all men by these presents, that Frank H. Elmore, agent for the Atlantic Lumber Company, a corporation under the laws of the State of Florida, as principal and the Fidelity and Deposit Company of Maryland, of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly authorized under the laws of the State of Florida to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, in the sum of twenty thousand dollars, for the payment

whereof, well and truly to be made, they do hereby bind themselves, their successors and assigns, jointly and severally.

Signed and sealed on this the 1st day of October, 1897.

The condition of the foregoing obligation is such that whereas the said The Atlantic Lumber Company has this day applied for an attachment against the goods and chattels, land and tenements of the said L. Bucki and Son Lumber Company, for the sum of nine thousand nine hundred and eighty and $\frac{80}{100}$ dollars, now if the said Frank H. Elmore, agent for the Atlantic Lumber Company shall well and truly pay all costs and damages which the said L. Bucki & Son Lumber Company may sustain in consequence of it, the said Atlantic Lumber Company, improperly suing out said attachment, then this obligation shall be null and void, otherwise it shall remain of full force and virtue.

FRANK H. ELMORE, [SEAL.]
Agent for the Atlantic Lumber Co.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.
By D. U. FLETCHER.

Attest: SAM'L J. SLATER,
Agent for the Company.
[CORPORATE SEAL.]

Taken and approved this 1st day of October, 1897.

P. D. CASSIDEY,
Clerk Circuit Court,
By H. J. CASSIDEY, [SEAL.]
Deputy Clerk.

And the said The Atlantic Lumber Company, then and there filed the said affidavit and the said bond or writing obligatory in the circuit court of Duval county, State of Florida; and thereupon did cause or procure a writ of attachment to be issued in behalf of the said The Atlantic Lumber Company, against all of the
6 logs, timber and lumber belonging to the L. Bucki and Son Lumber Company, situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, or so much thereof as could be found, as would satisfy the sum of nine thousand nine hundred and eighty dollars and eighty cents, which said writ of attachment was in the words and figures following, to wit:

The State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to attach and take into custody all of the logs, timber and lumber belonging to the L. Bucki and Son Lumber Company situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, or so much as can be found as will be sufficient to satisfy the debt or sum demanded to wit: $9,980.80 with costs, in that certain suit pending in the circuit court of the fourth judicial circuit of the State of Florida, in and for

Duval county, wherein The Atlantic Lumber Company, a corporation existing under the laws of the State of Florida, is plaintiff, and L. Bucki & Son Lumber Company, a corporation under the laws of the State of New Jersey, is defendant. And make return of this writ according to law.

Witness the Honorable R. M. Call, judge, as also P. D. Cassidey, clerk, and the seal of said court, at the court-house in Jacksonville, Florida, this 1st day of October, A. D. 1897.

P. D. CASSIDEY, *Clerk*,
[SEAL.] By H. J. CASSIDEY,
Deputy Clerk.

R. H. LIGGETT,
Plaintiff's Attorney.

And the said The Atlantic Lumber Company, then and there improperly and without just cause, caused the sheriff of the said county of Duval to levy the said writ upon the property of the plaintiff of the value of over fifteen thousand dollars, to wit: upon one million two hundred and fifty thousand feet of yellow-pine merchantable lumber then at plaintiff's mill site in the city of Jacksonville, Duval county, Florida, all of which was then and there the property of the plaintiff; and then and there the said The Atlantic Lumber Company caused the said sheriff to take and the said sheriff did take under and by virtue of the said writ, into his, the said sheriff's possession and custody, all of the said lumber, for a long period of time, to wit: for one month.

And the plaintiff declares upon the said bond or writing obligatory of the defendant hereinbefore set forth and shows as a
7 breach of the condition thereof, that the said writ of attachment, mentioned in said bond, and hereinbefore set forth, was improperly sued out by the said The Atlantic Lumber Company, for that the averment in the said affidavit, hereinbefore set forth, that the plaintiff, the defendant in said attachment proceedings, was indebted to the said The Atlantic Lumber Company in the sum of ninety-nine hundred and eighty dollars and eighty cents ($9,980.80) was as plaintiff avers, false and untrue, at the time when made, and the said The Atlantic Lumber Company had no meritorious cause of action therefor, against this plaintiff, the defendant in said attachment proceedings. And the plaintiff avers that the allegations in the said affidavit that the said The Atlantic Lumber Company had a lien on all of the said logs, timber and lumber belonging to the plaintiff mentioned in said attachment affidavit; and that the said property would be removed beyond the jurisdiction of the circuit court for the fourth judicial circuit of Florida in and for the said county of Duval; and that the said The Atlantic Lumber Company, had reason to believe that the said logs, timber and lumber were about to be removed from Duval county, Florida, in which they were then situated and that plaintiff was about to remove its property out of the State of Florida, were, and each and every of such allegations was false and untrue, at the time when made. And this plaintiff avers that on the first of October, A. D. 1897, it was

and for many years prior thereto had been engaged at the said mills and premises in the manufacture of hard-pine lumber and timber, and that it had on the day and year aforesaid, and at all times for several years prior thereto, an officer and agent in its employ and present in the said county of Duval upon whom personal service of any process of a court of law or equity, both mesne and final, could be legally made, which was well known to the Atlantic Lumber Company, on the day and year aforesaid. And the plaintiff avers that it, on, to wit: the first day of October, A. D. 1897, did not reside beyond the limits of the State of Florida within the sense and meaning of the attachment laws of the State of Florida, and that all its business as a manufacturer of lumber aforesaid was done and performed, on the day and year aforesaid, and for many years prior thereto, in the said county of Duval, which was well known to said The Atlantic Lumber Company, on the day and year aforesaid.

And the plaintiff further avers that afterwards, to wit: on the twenty-first day of October, in the year aforesaid, the said suit by the said The Atlantic Lumber Company against the plaintiff, and the said writ of attachment and all proceedings had thereon and therein, were duly removed under the laws of the United
8 States of America, to the circuit court of the United States for the southern district of Florida, and afterwards, to wit: on the 1st day of November, in the year A. D. 1897, on the motion of the plaintiff (the defendant in the said attachment proceedings) in the said last-mentioned court to dissolve the said writ of attachment, on grounds apparent on the face of the record, after argument of counsel for plaintiff and defendant, the court did render its judgment dissolving the said writ of attachment, among other reasons, on the ground that there was not due the said The Atlantic Lumber Company on the said 1st day of October, 1897, said sum of money for which it could maintain a suit on said day against the plaintiff, and ordered that all of the property so as aforesaid levied upon, under and by virtue of the writ to be delivered and returned to the plaintiff, and that the said judgment dissolving the said writ of attachment remains in full force and effect, and is in no way reversed or made void.

And this plaintiff further avers that at the time the said lumber was levied upon as aforesaid, in virtue of the said writ, the plaintiff was engaged in an extensive business of manufacturing hard-pine lumber at and by the use of its mills, dry kilns and mill plant in which said business, the plaintiff manufactured and sold, hard-pine timber and lumber in an amount averaging for each working day in the year, one hundred thousand feet board measure and upwards; and that the said one million two hundred and fifty thousand feet of yellow-pine merchantable lumber, so as aforesaid levied on by virtue of said writ of attachment, was the manufactured product of plaintiff's said mills and mill plant, and was a part of plaintiff's stock in trade; and by reason of said improper issuing and levy of the said writ, the plaintiff's said business was seriously injured for a long period of time, to wit: for six months, and be the reason aforesaid, the plaintiff was interrupted, hindred and delayed and

obstructed in its said business for the period of, to wit: six months and upwards, to the great damage and injury of the plaintiff.

And the plaintiff avers that it has been put by reason of the premises, and the levying of the said writ, to great expense and trouble in and about the procuring the discharge and dissolution of the said writ of attachment, and it has been compelled to pay out large sums of money for traveling expenses, of the officers and agents of plaintiff, to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out other large sums of money, as costs and attorneys' fees; and has been compelled to incur and has incurred valid
9 obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the said improper issuing of the said writ, and the levy thereof, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times Union and Citizen, and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers; and has been damaged in other large sums of money by not being able, in consequence of the said writ and levy thereof, to perform contracts and fill orders for manufacture- timber and lumber, which contracts were entered into, and which orders were accepted before the said writ was issued.

And the plaintiff claims twenty thousand dollars damages.

And for that heretofore, to wit: on the first day of October, 1897, the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, did institute its suit in the circuit court of Florida, fourth judicial circuit, in and for Duval county, against the plaintiff herein, and then and there, by its agent, Frank H. Elmore, who was then and there a clerk in the employ of the said The Atlantic Lumber Company, make and verify under oath, an affidavit in the words and figures following, to wit:

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

ATLANTIC LUMBER COMPANY, a Corporation,
vs.
L. BUCKI AND SON LUMBER COMPANY, a Corporation.

STATE OF FLORIDA,
Duval County.

Be it remembered, that on this the 1st day of October, 1897, in the county of Duval and State of Florida, before the undersigned, personally came Frank H. Elmore, who made oath before me that he is an agent of the Atlantic Lumber Company, a corporation existing under the laws of the State of Florida, and its authorized agent, for the purpose of making this affidavit; and that the L. Bucki and Son Lumber Company is a corporation under the laws of the State

of New Jersey, and resides beyond the limits of the State of Florida; that the said L. Bucki and Son Lumber Company is indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars, and that the same is actually due; and that the
10 affiant has reason to believe, that the said L. Bucki and Son Lumber Company is about to remove its property out of the State of Florida; and that it (is) fraudulently disposing of its property; and that it will fraudulently part with its property before judgment can be obtained against it; and that it resides beyond the limits of the State of Florida.

FRANK H. ELMORE.

Sworn to and subscribed before me this 1st day of October, 1897.

P. D. CASSIDEY,

[SEAL.] *Clerk Circuit Court of Duval County, Florida,*

By H. J. CASSIDEY,

Deputy Clerk.

And on the first day of October, 1897, the defendant, The Fidelity & Deposit Company of Maryland, for the purpose of securing the plaintiff against all costs and damages which said plaintiff (defendant in said attachment proceedings) might sustain in consequence of the said The Atlantic Lumber Company's improperly suing out a writ of attachment in said action against the goods and chattels, lands and tenements of the plaintiff (defendants in said attachment proceedings) for the sum of seventy-five thousand dollars, did make and enter into its certain writing obligatory, under the corporate seal or said defendant company, which said writing obligatory was in the words and figures following, to wit:

Know all men by these presents, that Frank H. Elmore, agent for the Atlantic Lumber Company, a corporation under the laws of Florida, as principal, and the Fidelity and Deposit Company of Maryland, of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly authorized, under the laws of the State of Florida, to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, in the sum of one hundred and fifty thousand dollars, for the payment whereof, well and truly to be made, they do bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this the 1st day of October, 1897.

The condition of the foregoing obligation is such that whereas the said The Atlantic Lumber Company has this day applied for an attachment against the goods and chattels, lands and tenements of the said L. Bucki and Son Lumber Company for the sum of seventy-five thousand dollars, now if the said Frank H. Elmore, agent for the Atlantic Lumber Company shall well and truly pay all costs and damages which the said L. Bucki and Son Lumber Com-
11 pany may sustain in consequence of it the said The Atlantic Lumber Company, improperly suing out said attachment,

then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

FRANK H. ELMORE, [SEAL.]
Agent for the Atlantic Lumber Co.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By D. U. FLETCHER. [SEAL.]

Attest: SAM'L J. SLATER, JR.,
[SEAL.] *Agent for the Company.*

Taken and approved by me this 1st day of October, 1897.

P. D. CASSIDEY,
Clerk Circuit Court,
By H. J. CASSIDEY,
Deputy Clerk.

And the said The Atlantic Lumber Company, then and there filed the said affidavit and the said bond or writing obligatory in the circuit court of Duval county, State of Florida; and thereupon did cause or procure a writ of attachment to be issued in behalf of the said The Atlantic Lumber Company, against the goods, chattels, lands and tenements of the plaintiff, in and for the sum of seventy-five thousand dollars, which said writ of attachment was in the words and figures following, to wit:

State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to attach and take into custody so much of the goods and chattels, lands and tenements of L. Bucki and Son Lumber Company, a corporation existing under the laws of the State of New Jersey, as will be sufficient to satisfy the debt or sum demanded, to wit: $75,000.00 with costs, in that certain suit pending in the circuit court of the fourth judicial circuit of the State of Florida, in and for Duval county, wherein The Atlantic Lumber Company, a corporation existing under the laws of the State of Florida, is plaintiff, and L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, is defendant. And make return of this writ according to law.

Witness the Honorable R. M. Call, judge, as also P. D. Cassidey, clerk, and the seal of said court at the court-house in Jacksonville, Florida, this 1st day of October, A. D. 1897.

[SEAL.] P. D. CASSIDY, *Clerk,*
By H. J. CASSIDEY,
Deputy Clerk.

R. H. LIGGETT,
Plaintiff's Attorney.

12 And the said The Atlantic Lumber Company, then and there improperly, and without just cause, caused the sheriff of the said county of Duval, to levy the said writ upon the property of the plaintiff of the value of over three hundred thousand dollars, to

wit: upon the saw-mill and saw-mill plant, three planing mills, three dry kilns, and the boilers, engines and machinery, tools and implements connected to and with the said mills and dry kilns, and upon the land of the plaintiff upon which the said properties were located, and upon a large amount and number of boilers, engines, machinery, tools and implements in and about and upon the said lands, not in use, and known as duplicate machinery, and upon four million feet of manufactured timber and lumber then in and on and about the land, and upon three million five hundred thousand feet of logs in the boom and pens of the plaintiff, near said mills, all of which was then and there the property of the plaintiff, and then and there the said The Atlantic Lumber Company improperly and without cause, caused the said sheriff under and by virtue of the said writ, to take all of the said lands and properties into his, the said sheriff's possession and custody, and to deprive the plaintiff of the possession and use thereof, for a long period of time, to wit: for six months.

And the plaintiff declares upon the said bond and writing obligatory of the defendant, hereinbefore set forth, and shows as a breach of the condition thereof, that the said writ of attachment mentioned in said bond, and hereinbefore set forth, was improperly sued out by the said The Atlantic Lumber Company, for that the averment in the said affidavit hereinbefore set forth, that the said plaintiff, the defendant in the said attachment proceedings, was indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars was false and untrue, at the time when made, and was made without just cause. And the plaintiff avers that the allegations in the said affidavit that the affiant had reason to believe that the plaintiff was about to remove its property out of the State of Florida; and that plaintiff was fraudulently disposing of its property; and that plaintiff would fraudulently part with its property before judgment could be obtained against it, were and each and every of such allegations was false and untrue, at the time they were made, and made without just cause. And this plaintiff further avers that on the first day of October, A. D. 1897, it was, and for many years prior thereto had been, engaged at the said mills and premises in the manufacture of hard-pine lumber and timber, and that it had on the day and year aforesaid, and at all times for several years prior thereto, an officer and agent in its employ, and present in the county of Duval,
13 upon whom personal service of any process of a court of law or equity, both mesne and final, could be legally made, which was well known to the said The Atlantic Lumber Company on the day and year aforesaid. And the plaintiff avers that it, on, to wit: the first day of October, A. D. 1897, did not reside beyond the limits of the State of Florida, within the sense and meaning of the attachment laws of the State of Florida, and that all of its business as a manufacturer of lumber aforesaid was done and performed, on the day and year aforesaid, and for many years prior thereto, in the said county of Duval, which was well known to the said The Atlantic Lumber Company on the day and year aforesaid.

And the plaintiff further avers that afterwards, to wit: on the twenty-first day of October, in the year aforesaid, the said suit by

the said The Atlantic Lumber Company against the plaintiff, and the said writ of attachment and all proceedings had thereon and therein, were duly removed under the laws of the United States of America, to the circuit court of the United States for the southern district of Florida, and afterwards, to wit: on the 14th day of February, in the year A. D. 1898, on motion of the plaintiff (the defendant in the said attachment proceedings) in the said last-mentioned court, to dissolve the said writ of attachment on issues of fact as to the debt and sum demanded in the said affidavit, and as to the special causes assigned, for such writ in the said affidavit, and on diverse grounds, among which was the ground that said attachment suit was brought to recover unliquidated damages, to wit: the sum named in the contract sued on as a penalty for the breach thereof, the said court, after a protracted trial and investigation of the said issues, did, upon the testimony adduced by the said The Atlantic Lumber Company, and without any evidence being adduced by the plaintiff, at the said trial on the said motion and issues, render its judgment dissolving the said writ of attachment, and ordered all of the property so, as aforesaid, levied upon, under and by virtue of the said writ, to be delivered and returned to the plaintiff; and the said court then and there found that the plaintiff was not on the first day of October, 1897, indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars, and the said judgment dissolving the said writ of attachment remains in full force and effect, and is in no way reversed, or made void.

And this plaintiff further avers that at the time the said goods, chattels, lands and tenements and mills were levied upon as aforesaid, in virtue of the said writ, the plaintiff was engaged in an extensive business of manufacturing hard-pine lumber at and by the use of the said mills, goods, chattels, lands and tenements, in
14 which said business the plaintiff manufactured and sold hard-pine lumber in an amount averaging for each working day in the year one hundred thousand feet, board measure, and upwards; and by reason of improper issuing and levy of the said writ the plaintiff's said business was destroyed and ruined for a long period of time, to wit, for six months, and thus the plaintiff's said business was wholly lost to it, and by the reason aforesaid, the plaintiff was interrupted, hindered and delayed and obstructed in its said business for the period of to wit: six months, and upwards, to the great damage and injury of the plaintiff.

And the plaintiff avers that it has been put, by reason of the premises, and the levying of the said writ, to great expense and trouble in and about procuring the discharge and dissolution of the said writ of attachment, and has been compelled to pay out large sums of money for traveling expenses, of the officers and agents of plaintiff to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out other large sums of money as costs and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution

of the said writ of attachment; and by reason of the improper issuing of the said writ and the levy thereof, as aforesaid, plaintiff was greatly injured in its credit and for a long time was and is unable to carry on its business aforesaid, for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen, and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers and has been damaged in other large sums of money, by not being able in consequence of the said writ and levy thereof, to perform contracts, and fill orders for the manufacture of timber and lumber, which contracts were entered into, and which orders were accepted before the said writ was issued, and has been damaged in other large sums of money by being compelled to pay the salaries of its officers and employés when idle, by reason of the said writ and levy, which said employés and officers were necessarily in the employ of plaintiff under contracts for fixed salaries by the year.

And plaintiff claims one hundred and fifty thousand dollars damages.

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Filed May 2, 1898. P. D. Cassidey, clerk ct. ct.

15 *Petition for Removal.*

In Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Def't.

Petition for removal of cause from circuit court of Duval county, Florida, to the circuit court of the United States for the southern district of Florida, fifth circuit.

Your petitioner, Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, respectfully shows to this honorable court that it is the defendant in this suit, which is of a civil nature and that the matter and amount in dispute in this case exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

2nd. That the controversy herein is between citizens of different States; that the plaintiff, L. Bucki and Son Lumber Company was at the time of the commencement of this suit, and still is, a corporation organized and existing under the laws of the State of New Jersey, and consequently was and is a citizen of the State of New Jersey, having its office and the place of its meetings of its officers, your petitioner is informed and believes at —— in said State, and that your petitioner, Fidelity and Deposit Company of Maryland at the time of the commencement of this suit — and still is a corporation

organized and existing under the laws of the State of Maryland, and therefore is a citizen of the State of Maryland, and of no other State, having its principal office in the city of Baltimore in said State.

3rd. That your petitioner desires to remove this suit before the trial thereof, into the United States circuit court, fifth judicial circuit, in and for the southern district of Florida. And your petitioner further presents that this suit was commenced on the 25th day of March, A. D. 1898, at which time the præcipe for summons was filed herein, and summons was issued returnable to the first Monday, to wit: the 2nd day of May, A. D. 1898, at which time your petitioner caused its appearance to be duly entered by its attorneys herein, and your petitioner is not required by the laws of the State of Florida, or by the rules of this court to plead to the declaration of the plaintiff herein until the first Monday, to wit: the 6th day of June,
16 A. D. 1898, and has made no defense and filed no plea herein.

4th. Your petitioner offers herewith good and sufficient surety for its entry in the circuit court of the United States for the southern district of Florida on or before the said rule day in June, to wit: June 6th, A. D. 1898, a copy of the record in this suit, and for paying all costs which may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto. And your petitioner therefore prays that the said surety and bond may be accepted, that this suit may be removed into the said circuit court of the United States to be held in the southern district of Florida, as aforesaid, pursuant to statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And your petitioner will ever pray, etc.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Per H. CRAWFORD BLACK, *Vice-President*,
Petitioner.

H. E. BULE, *Secretary.* [SEAL.]

D. U. FLETCHER AND
R. H. LIGGETT,
Attorneys for Petitioner.

STATE OF MARYLAND, }
City of Baltimore. }

H. Crawford Black makes oath that he is the vice-president of the above-named Fidelity and Deposit Company of Maryland, that the foregoing petition is true to his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

H. CRAWFORD BLACK,
Vice-President.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

FRED S. AXTELL,
Notary Public. [SEAL.]

(Indorsed:) Filed May 4th, 1898. R. M. Call, judge. Filed June 4, 1898. P. D. Cassidey, clerk.

Bond for Removal of Cause.

In the Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

17 L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Know all men by these presents, that we, Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as principal, and R. C. Cooley and R. Bowen Daniel of Duval county, Florida, as sureties, are holden and stand firmly bound unto the L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the L. Bucki and Son Lumber Company, a corporation as aforesaid, its successors and assigns, we bind ourselves, successors, heirs, representatives and assigns jointly and firmly by *there* (these) presents, upon condition, nevertheless, that, whereas the said Fidelity and Deposit Company of Maryland has filed its petition in the circuit court of Duval county, Florida, for the removal of a certain cause therein pending wherein the said L. Bucki and Son Lumber Company is plaintiff, and the said Fidelity & Deposit Company of Maryland is defendant, to the circuit court of the United States, in and for the southern district of Florida; now if the said Fidelity & Deposit Company of Maryland shall enter in the said circuit court of the United States on or before the first Monday of June next, to wit: June 6th, 1898, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise shall remain in full force and virtue.

In witness whereof the said Fidelity and Deposit Company, by its proper officer duly authorized and empowered thereto, and R. C. Cooley and R. Bowen Daniel have hereunto set our hands and seals this 18th day of May, A. D. 1898.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By H. CRAWFORD BLACK, *Vice-President.*
H. E. BULE, *Sect.* [SEAL.]
R. C. COOLEY. [SEAL.]
R. BOWEN DANIEL. [SEAL.]

[CORP. SEAL.]

(Indorsed:) Filed May 4, 1898. R. M. Call, judge. Filed June 4, 1898. P. D. Cassidey, clerk.

18 *Order for Removal.*

In the Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The defendant herein having within the time provided by law filed its petition for the removal of this cause to the circuit court of the United States for the southern district of the State of Florida, and having at the time offered its bond with R. C. Cooley and R. Bowen Daniel good and sufficient sureties, pursuant to the statute and conditioned according to law, now, therefore, this court does hereby accept and approve the said bond and accept said petition and it is ordered that this cause be removed for trial to the circuit court of the United States for the southern district of Florida, pursuant to the statutes of the United States, as prayed in and by said petition, and that all other proceedings in this court be stayed.

R. M. CALL, *Judge.*

I, P. D. Cassidey, clerk of the circuit court of the State of Florida, fourth judicial circuit in and for the county of Duval, do hereby certify that the foregoing pages numbered from one to 31 inclusive, constitute a true copy of all the papers, proceedings and records in the case of L. Bucki and Son Lumber Company a corporation organized and existing under the laws of the State of New Jersey, plaintiff, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, defendant, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this the 12 day of November, A. D. 1898.

P. D. CASSIDEY,

[SEAL.] *Clerk of the Circuit Court of the State of Florida, Fourth Judicial Circuit, in and for the County of Duval.*

(Indorsement on back of transcript:) L. 35. No. 116. U. S. court so. dist. Florida. L. Bucki & Son L. Co. *vs.* Fidelity and Deposit Co. Transcript from State court. Filed Nov. 12, 1898. E. O. Locke, clerk.

19 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff by H. Bisbee, its attorney, and amends each count in the plaintiff's declaration herein, by adding after the

word "issued," in next to the last line of the first count of the declaration the following words, to wit: "And that no part of the said costs and damages have ever been paid to the plaintiff." and the plaintiff amends the second count of the said declaration by adding after the word "year," in the third line from the close of said count, the following words, to wit: "that no part of the said costs and damages have ever been paid to the plaintiff." And to the extent of the said amendments, the plaintiff confesses the demurrer filed to the said declaration.

And the plaintiff further amends the second count of the said declaration, by striking out the following words, to wit: "to wit: the sum named in the contract sued on as penalty for the breach thereof."

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Amendment to declaration. Filed Nov. 21st, 1898. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI AND SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Now comes the defendant in the above-stated cause, by its attorneys, and, subject to its demurrer, heretofore filed to the declaration herein which it insists upon as applicable to the declaration as amended, moves the court to strike from the said declaration the allegation hereinafter particular-specified, and, severally, to strike from said declaration, and from each count thereof, each of the said allegations, upon the ground that the said allegations, and each one thereof, are calculated to embarrass and prejudice a fair trial of the cause and are impertinent to the cause of action set forth in the said declaration, and in each count thereof, viz:

1st. All allegations appearing in each count of the declaration relating to the improper levying of the writs of attachment therein referred to.

2nd. All allegations appearing in each count of the said declaration stating that allegations appearing in the plaintiff's affidavits for attachment in the causes herein referred to were false and untrue.

3rd. All allegations to the effect that plaintiff had at all times an agent in Duval county, Florida, upon whom services or process could be made, and that plaintiff was not a non-resident of the State of Florida within the meaning of the attachment law.

4th. All allegations appearing in each count of said declaration relating to the special business in which plaintiff was engaged, and to damage sustained by it in that special business by reason of the issuance and levy of the writs of attachment.

5th. All allegations appearing in each of said counts to the effect that plaintiff was compelled to pay counsel fees, and to incur liabilty for counsel fees, to procure a dissolution of the attachments herein referred to.

6th. All allegations appearing in each of said counts as to injury sustained by plaintiff in its credit, and as to its inability to carry on business for want of credit, by reason of said attachments, and by reason of the publication thereof in the newspaper referred to in said counts.

7th. All allegations in relation to damages sustained by plaintiff in consequence of its liability to perform contracts with third persons, and to fill orders, for manufactured timber and lumber, in consequence of the levy of said writs of attachment.

And the defendant further moves the court to strike from the second count of the said declaration the following allegations therein contained, on the same grounds, viz:

a. The allegation appearing in said count to the effect that plaintiff moved to dissolve the attachment on the ground that it was for unliquidated damages.

b. The allegation to the effect that the attachment was dissolved upon the testimony introduced by the Atlantic Lumber Company, and without any evidence being introduced by the plaintiff.

c. The allegation as to the plaintiff being engaged in business by the use of the property levied upon under the writ of attachment, and that its business was interrupted, hindered, destroyed and ruined by reason of the levy of said writ.

R. H. LIGGETT,
D. U. FLETCHER.

21 And defendant by its attorneys, moves the court to require the plaintiff to file a full, complete and itemized bill of particulars of the items and amount of damages claimed by it, by reason of the facts alleged in the declaration, upon which it seeks to recover damages, for the reason that such bill of particulars is indispensable in order to enable defendant to prepare its defense.

R. R. LIGGETT,
D. U. FLETCHER,
Attorneys for Defendant.

(Indorsed:) Motion to strike various allegations from declaration and for bill of particulars. Filed Dec. 3rd, 1898. E. O. Locke, clerk.

In the United States Circuit Court, Southern District of Florida.

THE L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Action on attachment bond.

This cause coming on to be heard upon the demurrer to the declaration and motion to strike certain portions of the declaration

herein filed, and having been fully heard and considered it is ordered that said demurrer be overruled, and that the words "without just cause" found in the 8th line of the 10th page of the record of the circuit court of the State of Florida, and the words "among other reasons" in the second line of the 13th page in said records, and the whole of the 8th, 9th, 10th and 11th lines of the 14th page and the language beginning with "and attorneys' fees" in the 12th line of said 14th page down to the words "and has been" in the 24th line of said page of the first count of said declaration; and the words beginning with "among which" in the 20th line 22nd page down to and including the words "for the breach thereof" in the 23rd line of the 22nd page and the words beginning with "upon" in the 24th line of said 22nd page and including all of the first line of said 22nd page of the declaration; and the words beginning with "traveling" in the 6th line, 24th page down to and including the first word of the 10th line; and the words beginning with and including "and attorneys' fees" in said 10th line down to the words "has been" in the 23rd line of the 24th page, be and they are hereby ordered stricken from said declaration.

22 And it is further ordered that the plaintiff file herein a bill or particulars showing the contracts made as alleged before said attachment, and the salaries paid to employés as alleged.

Done and ordered this 11th day of February, 1899.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Order upon demurrer and motion to strike certain portions of the declaration. Filed Feb. 11th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant. } Bill of Particulars.

The names and annual salaries of officers and employés of the plaintiff on the first day of October, 1897, are as follows:

Chas. L. Bucki, president	$5,000
J. D. Heagy, mill superintendent	2,500
W. C. Cox, stenographer	720
J. B. Rosser, auditor and book-keeper	1,500
Frank Holsche, office boy	360
George A. Benjamin, planing mill superintendent	1,200
George Martin, engineer	1,080
Four watchmen	1,800
H. Rotschild, book-keeper	1,200
Kurt, office boy, New York	360
L. J. Brush, logging supt. and inspector	900
H. Barker, chief shipping clerk	1,200

C. W. Simmons, secretary and treasurer	3,600
H. W. Simmons, salesman	1,200
Isadore Cohen, salesman	1,800
J. B. Murphree, salesman	1,800

The loss in consequence of the attachment by not being able to fill orders and contracts for lumber existing and pending October 1st, 1897, are as follows:

Contracts with Degnan McLean & Company, of New York city for fine quality of timber and lumber, loss as follows, to wit:

Loss of profits at about $4 per thousand on 483,000 feet, by not being able to deliver the same.

23 Also, loss of about $6,000, that sum being charged to L. Bucki & Son Lumber Company by said Degnan McLean & Company as the difference which that company had to pay for timber and lumber bought at retail in New York city to make up deficiencies in deliveries, and the prices which L. Bucki & Son Lumber Company were to receive for same.

Contract with the Yellow Pine Lumber Company of New York City.

Loss of profits by not delivering 800,000 feet, about $4 per thousand. Also loss of about $10,000 charged L. Bucki & Son Lumber Company, or rather retained by said yellow pine company, as the difference between the contract price of such timber and lumber, and the price which said yellow pine company had to pay at retail in New York, to make up deficiencies in deliveries under the contract.

Contract with Sheppard & Morse Lumber Company of Boston, Mass.

Loss of profits by not delivering about 100,000 feet about $4 per thousand. Also loss of about $600, the difference which said Sheppard & Morse Lumber Company had to pay between the contract price and the market price of lumber to make up deficiencies in deliveries.

Contract with E. B. Hunting & Co., of Baltimore, Md.

Loss by not delivering 280,000 feet, to wit: loss of difference between the contract price and the price said company had to pay in the market to make up deficiencies in deliveries, $1100.

And the defendant is hereby notified that at the trial of the cause the plaintiff will adduce, or offer to adduce, testimony establishing damages by way of demurrage on the schooner R. F. Hartley, $100, caused by the writ of attachment. Also expenses and disbursements made and incurred in preparing for the trial of the motions to dissolve the attachments, to wit: for monies paid and incurred in employing agents to ascertain whether or not it was practicable or possible for the Atlantic Lumber Company to obtain pine timber and pine logs sufficient in quantity, and sufficiently near to Jackson-

ville to enable the said The Atlantic Lumber Company to continue in the performances of their contract for the remaining period of three and one-half years, and to deliver logs of the description called for by the contract into the boom of the L. Bucki & Son Lumber Company at the price of $7.25 or $7.75 per thousand feet, board measure, called for by the contract, and make any profit thereon, such testimony being essential to rebut and overcome evidence adduced by the Atlantic Lumber Company to establish that it
24 was able to continue in the performances of the contract, the amount so expended by L. Bucki & Son Lumber Company, being about $500.

We also give notice that we shall adduce testimony to establish the necessary expenditure of about $150 in correspondence by telegraph and by letter, which correspondence was necessary to prepare to try the motions to dissolve the attachment.

We shall also adduce testimony to prove damages by way of costs in obtaining forthcoming bonds, premiums paid on the forthcoming bonds to the Fidelity & Deposit Company of Maryland, $1,000.

Also premium on insurance policies on mill plant, etc., during the time it was in possession of the sheriff, at the rate of $2,400 per year; taxes during like period, at the rate of about $800 per year; rent paid Joseph D. Mitchell and estate, at the rate of $400 per year, for the use of boom-pen facilities; day and night watchman at the mill at $5 per day.

We shall also offer evidence of damages sustained by attorneys' fees paid and obligation to pay attorneys' fees in obtaining a dissolution of the attachments, and also damages to the credit of the plaintiff by reason of the attachments, and by reason of the fact that the issuing and levy of the attachments *was* published and given wide circulation in the newspaper mentioned in the declaration and other evidence to prove all items of damages stricken from the declaration by the order of the court.

H. BISBEE,
Attorney for Plaintiff.

Service of a copy of the foregoing notice and bill of particulars *excepted* (accepted) this 15th day of February, 1899.

R. H. LIGGETT,
Defendant's Att'y.

(Indorsed:) Bill of particulars and notice of offer of proof. Filed Feb. 16th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Now comes the plaintiff by H. Bisbee, its attorney, and without waiving any objection or exception to the order of the court

25 on motion to strike out certain parts of the declaration in the above-entitled cause, that the words and matters stricken out in pursuance of the said order are as follows, to wit: The words "and without just cause" found in the 8th line of the 10th page of the record of the circuit court of the State of Florida, the same being in the second line of the fourth paragraph of the first count of said declaration. And the words "among other reasons" in the second line of the 13th page in said record, the same being in the fourteenth line of the sixth paragraph of said count. And the words "traveling expenses of the officers and agents of plaintiff, to attend court and preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out large sums of money as" and the words "and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorney's fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the said improper issuing of the said writ, and the levy thereof, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers," on the fourteenth page of the said record, and in the eighth paragraph of the first count herein.

And further, the words, "among which was the ground that said attachment suit was brought to recover unliquidated damages, to wit: the sum named in the contract sued on as a penalty for the breach thereof;" and the words "upon the testimony adduced by the said The Atlantic Lumber Company, and without any evidence being adduced by the plaintiff, at the said trial on the said motion and issues;" on the twenty-second and twenty-third pages of the said record, and in the sixth paragraph of the second count of said declaration. And the words "traveling expenses of the officers and agents of plaintiff, to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out other large sums of money as" and the words "and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the improper issuing of the said

26 writ and the levy thereof, as aforesaid, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business aforesaid, for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers;" on the twenty-third and twenty-fourth pages of said record, and in the eighth paragraph of the said second count.

H. BISBEE,
Attorney for Plaintiff.

Received a copy of the foregoing amendment Feb. 15, '99.

R. H. LIGGETT,
Def't- Attorney.

(Indorsed:) Amendment of declaration. Filed Feb. 16th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff, by H. Bisbee, its attorney, and moves to set aside the order heretofore made in this action, striking out from the declaration certain items of damages on the ground that the court erred in granting said order, and the items of damages stricken out are proper for the jury to consider.

H. BISBEE,
Att'y for Plaintiff.

Please take notice that on Wednesday, the eighth day of March, 1899, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we shall call up the foregoing motion for disposition.

H. BISBEE,
Att'y for Plaintiff.

To Richard H. Liggett, Esq., attorney for defendant.

Service of the foregoing notice accepted this 27th day of February, 1899.

R. H. LIGGETT,
Att'y for Defendant.

(Indorsed:) Motion to set aside order, striking allegation from declaration. Filed Mar. 8th, 1899. E. O. Locke, clerk.

27 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Please take notice that in the bill of particulars heretofore filed in this cause, in the statement of losses in consequence of the attachment by not being able to fill orders and contracts existing and pending October 1st, 1897, the Degnan-McLean Construction Company was inadvertently and erroneously styled Degnan McLean & Co., and on the twenty-first day of March, 1899, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I shall apply to the court for leave to amend said bill of particulars by striking therefrom the

words "Deguan-McLean & Company," wherever they occur, and inserting in place thereof the words "Deguan McLean Construction Company."

H. BISBEE,
Attorney for Plaintiff.

I hereby acknowledge service of the foregoing notice and consent that the amendment therein indicated may be made.

R. H. LIGGETT,
Counsel for Defendant.

(Indorsed:) Amendment to bill of particulars. Leave to file granted. James W. Locke, judge. Filed Mar. 23rd, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI AND SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Now comes the defendant in the above-stated cause, The Fidelity and Deposit Company of Maryland, a corporation, by R. H. Liggett and D. U. Fletcher, its attorneys, and for a plea to the declaration of the plaintiff filed herein, and to each count thereof, says that the plaintiff was not damaged as in the said declaration alleged.

R. H. LIGGETT.
D. U. FLETCHER,
Attorneys for Defendant.

28 STATE OF FLORIDA,
Duval County.

Before me, the undersigned, a notary public in and for the State of Florida at large, personally came, within the county of Duval and State of Florida, R. Bowen Daniel, who being by me duly sworn, says that he is the agent of the Fidelity and Deposit Company of Maryland and makes this affidavit in its behalf, and that the foregoing plea is true as he is informed and believes.

R. BOWEN DANIEL.

Sworn to and subscribed before me this 22nd day of April, 1899.

ERNEST C. BIXLER,
[SEAL.] *Notary Public, State at Large.*

(Indorsed:) Plea of *non damnificatus*. Filed Apr. 24th, 1899. E. O. Locke, clerk, by Louis Starke, deputy.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff by H. Bisbee, its attorney, and takes issue upon the plea of defendant filed on the 24th day of April, 1899.

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Joinder of issue upon plea of *non damnificatus*. Filed Apr. 28th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff, by H. Bisbee, its attorney, and by way of amendment to its bill of particulars hereinbefore filed, says that its loss upon the contract with E. B. Hunting & Co. of Baltimore,
29 Md., mentioned in said bill of particulars, by not delivering 280,000 feet of lumber, is confined to the loss of profits plaintiff would have made by the performances of said contract by delivering said lumber, amounting to the sum of, to wit: $1,100.

H. BISBEE,
Attorney for Plaintiff.

Received a copy of the foregoing amendment May 3rd, 1899.

R. H. LIGGETT,
Attorney for Defendant.

(Indorsed:) Amendment to bill of particulars. Filed May 3rd, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

The defendant will please take notice that at the trial of this action, we shall offer in evidence, and insist upon proving the following items of damages:

First. All monies necessarily paid out for counsel and attorneys' fees, for services in preparing motions to dissolve the attachments, and in preparing for the trial of the said motions and in the trial of the said motions, which services were caused by and were in conse-

quence of said writs of attachment. Also reasonable compensation for the services of attorneys-at-law employed as above, which have not been paid, which services were caused by and in consequence of said writs of attachment. And we shall offer evidence to prove the value of the services of the said attorneys-at-law in the circuit court of the United States for the southern district of Florida, in the United States circuit court of appeals for the fifth circuit, and in the Supreme Court of the United States, in resisting the attempts and efforts of the Atlantic Lumber Company and the said defendant to arrest and vacate the judgments of the said circuit court dissolving said attachments. The period of the time covered by such services was from the fourth day of October, 1897, to the 8th day of June, 1899.

Second. Plaintiff at the trial of said action will offer evidence to prove, and insist upon proving, that the said writs of attachment were levied upon substantially all the property and assets of
30 the plaintiff, to wit: its mill properties, manufactured timber and lumber, and logs in its boom in Jacksonville, Florida; and that in consequence of the levies of the said writs upon the said properties, the plaintiff's ways and means of continuing in business were taken away from the possession and control of the plaintiff, and the plaintiff was thereby deprived and prevented from carrying on its business of manufacturing and selling hard-pine lumber from the first day of October, 1897, to the 8th day of June, 1899. And we shall offer evidence to prove, and insist upon proving, that in consequence of the levies of said writs of attachment upon all the said properties, it was impossible or impracticable for the plaintiff to obtain the necessary money or credit upon which to do any business for the entire period above mentioned; and to that extent the plaintiff will offer evidence to prove and insist upon proving the injury and damage to its credit as the direct consequence of the levy of the said writs upon the properties aforesaid.

Third. The plaintiff will offer evidence to prove and insist upon proving at the trial of said action, all payments of money actually made, or obligations actually incurred in necessary prevalling (prevailing) expenses of the plaintiff's officers and agents in preparing for the dissolution of the said attachments, and in obtaining a dissolution of the same, and that such expenses and obligations were necessarily incurred as the direct consequence of the levy of the said writs of attachment; and all moneys paid out and obligations incurred in traveling expenses of the attorneys of the plaintiff, and in printing of briefs, and motions, and other papers in accordance with the rules of court, necessary to properly resist the attempts and efforts of the defendant and the Atlantic Lumber Company to reverse the said judgments dissolving the said writs of attachment in the United States circuit court of appeals for the fifth circuit, and the Supreme Court of the United States; and for services of attorneys-at-law rendered in resisting the efforts of the said defendant and the said The Atlantic Lumber Company to have the circuit court of Duval county proceed with the trial of the suits of the Atlantic Lumber Company against the plaintiff in the summer of

1899, and to resist attempts of the defendant and the said The Atlantic Lumber Company to obtain a writ of mandamus from the supreme court of Florida to compel the said circuit court of Duval county to proceed with the trial of the said action, in the summer of 1899, and after the circuit court of appeals aforesaid had affirmed the judgment, and denied the motions of the Atlantic Lumber Company to remand the case for want of jurisdiction, and
31 after the Supreme Court of the United States had denied the application of the said The Atlantic Lumber Company to review the said judgments dissolving the said attachments on writ of certiorari to the said circuit court of appeals.

And you will further take notice that at the hearing of the motion to restore to the declaration certain matters heretofore stricken out, plaintiff will ask the court to order that the said items of damages may be taken and considered as a part of the declaration and each count thereof; and at the same (time) we shall ask for leave to strike from the declaration any definite limit of time during which damage resulted to the plaintiff in consequence of said attachments.

H. BISBEE,
Attorney for Plaintiff.

Service of the foregoing notice accepted this 9th day of January, 1900.

R. H. LIGGETT,
Attorney for Defendant.

(Indorsed:) Notice of offer of proof of damages. Filed Jan. 17th, 1900. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

THE L. BUCKI & SON LUMBER CO.
vs.
THE FIDELITY & DEPOSIT CO. OF MARYLAND.

On declaration.

This cause coming on to be heard upon the motion to restore to the declaration all clauses and paragraphs heretofore stricken out, and having been fully heard and argued by counsel and having been duly considered, it is ordered that such matters be so far restored as to permit testimony to be introduced upon the questions of damages resulting from counsel fees and loss of credit, subject to any subsequent ruling and charge of the court to the jury.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., Jan'y 19th, 1900.

(Indorsed:) Order on motion to restore to the declaration certain clauses and paragraphs. Filed Jan. 25th, 1900. E. O. Locke, clerk, by Louis Starke deputy.

32 United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER CO.
vs.
THE FIDELITY & DEPOSIT CO. OF MARYLAND.

We, the jury, find for the plaintiff and assess its actual damages, exclusive of attorney's fees, at $10,880.00.

And if the court should be of the opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7500.00 as a reasonable and just fee for the services proven.

Foreman, WM. MICKLER.

(Indorsed:) "Verdict. Filed Feb. 2nd, 1900." E. O. Locke, clerk.

Assignments of Error.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

First assignment of error. The trial court erred in not giving to the jury the following instruction requested by the plaintiff, to wit:

It is a question of fact for you to determine whether or not if these attachments had not been issued and levied, the plaintiff would have been able to supply its mills with logs after such attachments and to what extent plaintiff would have been able to supply its mill with logs and continued in its business and the amount of profits it would have made in such business in case said attachments had not been issued, provided you believe from the evidence that the direct consequences of such attachment caused the plaintiff to cease continuing in business, and that plaintiff would have and could have continued in business if such attachments had not been issued and levied and continued upon plaintiff's properties.

Upon the following grounds to wit:

First. That the plaintiff had the right to have the material questions of fact stated in said instruction tried by jury.

33 Second. Because said instruction embraced a correct principle of law applicable to the facts and evidence adduced in the case;

And upon other grounds appearing on the face of said requested instruction.

Second assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

The question whether or not the plaintiff was deprived of the means and financial ability to supply itself with logs for its mill and

continue in business after October 1st, 1897, as a direct consequence of the issuing and levying of these attachments is one for the jury to decide.

Whether or not the plaintiff would have been financially able to continue in its usual business after October 1st, 1897, if these attachments had not been levied is a question of fact for the jury to decide upon a consideration of all the evidence in the case.

On the following grounds, to wit:

(1.) On the ground that the said refusal denied to the plaintiff the right of trial by jury of material facts which arose in the case upon evidence applicable thereto.

(2.) On the ground that such instruction embraced correct principles of law;

And on other grounds appearing on the face of said instruction.

Third assignment of error. The court erred in refusing to give the following instruction requested by the plaintiff, to wit:

If you believe from the evidence that the issuing and levying of these writs of attachment injured or impaired the credit or financial standing of the plaintiff as it existed on October 1st, 1897, then the plaintiff is entitled to recover such damages for injury to its credit as you find from the evidence the plaintiff sustained as a direct consequence of the issuing and levying of such writs upon the properties of the plaintiff.

On the following grounds:

(1.) On the ground that the said instruction embraced correct principles of law applicable to the facts of the case in evidence.

(2.) Because such refusal denied to the plaintiff the right to trial by jury of material facts.

(3.) Because injured or impaired credit caused by the writs of attachment is a proper element of damages to be submitted to the jury.

34 Fourth assignment of error. The court erred in refusing to give to the jury the following instruction prayed for by the plaintiff, to wit:

On this subject of the financial condition of the plaintiff with respect to its ability and means of continuing in its business after October 1st, 1897, you must understand that the question for you to determine is not the opinion that any officer of the Atlantic Lumber Company entertained of the financial condition of the plaintiff, nor is it the question of the opinion entertained by any particular bank or other business house as to plaintiff's financial standing, especially so if differences or controversies had arisen between them.

The real question before you is what was the general financial condition of the plaintiff on October 1st, 1897, in respect to its ability and means of continuing in business if these attachments had not been levied, and in reaching a conclusion on this subject it is your duty to give weight to and consider the amount and value of all its property, its mill plant, lumber, timber and logs on hand and good outstanding claims against third parties and the amount of its liabilities due and not due on October 1st.

You should also consider its business connections with those en

gaged in the lumber business, the good will of those engaged in such business, and its facilities for doing business, finding a market for the product of its mills.

You have heard the testimony as to the available round timber of logs on and after October 1st, 1897, and from this evidence, applying your common sense to the subject, you will conclude whether or not it is reasonably probable or certain that the plaintiff with such means as it had at its command would have been able to have supplied its mill with logs during the time attachments rested on plaintiff's property, if these attachments had not been levied. Whether what one has done, another with equal means and skill can do, is not a question of science or law, but one of fact for you to decide.

On the following grounds:

(1.) Because said instruction embraced correct principles of law.

(2.) Because plaintiff had the right to have submitted to the jury the statement of facts presented by the said instruction which questions were material to the plaintiff's case.

And for other reasons appearing on the face of said instruction.

35 Fifth assignment of error. The court erred in refusing to give the following instruction requested by the plaintiff, to wit:

If you believe from the evidence that after allowing all credits due for logs delivered prior to September 15th, 1897, the L. Bucki & Son Lumber Company on September 30th, 1897, did not owe the Atlantic Lumber Company for any logs delivered prior to September 15th, 1897, then the court instructs you that on October 1st, the Atlantic Lumber Company had no cause of action against the L. Bucki & Son Lumber Company on October 1st, 1897, and you will consider this fact in connection with the question of the financial condition and standing of the plaintiff on October 1st, 1897. The plaintiff was not in default for not paying for logs, for the logs delivered after September 14th, 1897, until after midnight of October 1st, 1897.

On the following grounds, to wit:

(1.) On the ground that it presented a correct principle of law applicable to the case, and was material to the plaintiff's case on the question of its financial condition and standing at the time the writs of attachment were issued.

(2.) On the ground that plaintiff had until midnight of October 1st, 1897, to pay any money that fell due on the first day of October.

Sixth assignment of error. The court erred in refusing to give to the jury the following instruction prayed for by the plaintiff, to wit:

If you believe from the evidence that the Atlantic Lumber Company had endorsed and negotiated the draft of August 16, 1897, for $5,340.75, and that on the 1st of October, 1897, the National Bank of Jacksonville was the holder of that draft, then the court instructs you that the Atlantic Lumber Company had no right to demand payment of the amount of that draft to it on October 1st, 1897, and you will also consider that fact in connection with the question of

the financial standing of the plaintiff on October 1st, 1897. The question of the financial standing of the plaintiff with the National Bank of Jacksonville is not to be confounded with or affected by the financial standing of the Atlantic Lumber Company with said bank; and if you believe from the evidence that the plaintiff *bona fide* claim- while said bank held the said draft for $5,340.75, that it, the plaintiff was entitled to a credit on said draft of the proceeds of another draft for $4,000 and that after October 1st, 1897, said bank took and discounted other negotiable paper of the plaintiff,
36 then you should consider these facts in reaching any conclusion as to the financial standing of the plaintiff with the said bank. You will not allow your minds to be influenced on the subject of the financial standing of the plaintiff with the National Bank of Jacksonville, on account of or by reason of any indebtedness by the Atlantic Lumber Company to such bank, for which the plaintiff was in no way liable.

On the grounds following, to wit:

(1.) That it embraced a correct proposition of law.

(2.) That it was essential to enable the jury to correctly apply the evidence mentioned in said requested instruction, and evidence of plaintiff's financial condition;

And on other grounds appearing on the face of said requested instruction.

Seventh assignment of error. The court erred in refusing to give to the jury the following instruction prayed for by the plaintiff, to wit:

The amount of debts which in the business the plaintiff was engaged in it owed and was able to carry and continue in business is not a question of law or science, but is a question of fact, for you, as twelve sensible men to decide. In this matter you will exercise and apply your knowledge of business affairs. You will apply your own judgment, and knowledge as to the amount of debts in comparison to its assets, the plaintiff could probably carry and continue in business.

(1.) On the ground that the plaintiff had the right to have submitted to the jury the question of fact stated in said requested instruction, and said instruction embraced a correct principle of law.

Eighth assignment of error. The court erred in refusing to give to the jury the following instruction prayed for by the plaintiff, to wit:

In determining whether or not it was reasonably probable that the plaintiff would have been able to continue in its business, and in its usual course of business, if these attachments had not been issued, you will take into consideration the amount and value and availability of the plaintiff's assets, its business and trade connections, and the reputation it had of manufacturing and delivering lumber according to its obligations on and prior to October 1st, 1897, and the patronage it had enjoyed. These assets consisted of its mill properties, lumber and timber on its yards and wharves and afloat in transit; and what was due and payable to plaintiff on October

1st, 1897. You will also take into consideration the amount
37 of debts and obligations the plaintiff owed on October 1st, 1897, as well those due and those then to become due.

On the following grounds, to wit:

(1.) On the ground that it was essential to enable the jury to understand how to apply the evidence upon the points embraced in the instruction, and

(2.) Because it embraced a correct proposition and principle of law, and the questions of fact presented were material to plaintiff's case,

And on other grounds appearing on the face of said requested instruction.

Ninth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

If upon all the evidence before you, you believe the plaintiff would have been able if these attachments had not been levied to have supplied and obtained logs for its mills, and continued in its usual business after October 1st, 1897, for the period of time these attachment liens prevented plaintiff from using its mills; then you will award damages for the loss of the use of its properties as you have been before instructed.

On the following grounds, to wit:

(1.) On the ground that it embraced a correct principle of law and a material question of fact which the plaintiff had the right to have submitted to the jury, and

(2.) On the ground that the same was a proper and necessary instruction to enable the jury to correctly apply the evidence before them upon the issue embraced in said instruction.

And on other grounds appearing on the face of said requested instruction.

Tenth assignment of error. The court erred in refusing to give to the jury the following instruction requested by plaintiff, to wit:

If you believe from the evidence that the direct and proximate effect of these attachments was to create a lien upon substantially all the assets and properties of the plaintiff, and that in consequence of such liens upon the said properties, the plaintiff did not own and control the means and did not have the requisite credit to enable it to purchase logs and continue in its usual course of business; and that if such attachments had not been issued, the plaintiff would have been able to continue to purchase a full supply of logs for its mills and continue in the usual course of business, then the court instructs you that the plaintiff is entitled to recover from the
38 defendant such sum of money as will compensate the plaintiff for all losses it sustained by reason of such attachments.

On the grounds following to wit:

(1.) On the ground that it contained a correct principle of law applicable to material facts which the plaintiff had the right to have submitted to the jury, and on the ground that it was the legal right of the plaintiff to recover all damages caused by the direct and proximate effect of the writs of attachment.

Eleventh assignment of error. The court erred in refusing to give to the jury the following instructions, to wit:

If you find from the evidence that the value of the use of the plaintiff's mill properties and business, or its net income, was, for nine months, a given sum of money per month, it does not follow that it is your duty to award the plaintiff such sum of money for each month subsequent to the attachment during the period of time you find plaintiff was deprived of its use of its properties in consequence of such attachments.

The value of the use of plaintiff's properties and his business after October 1st, 1897, may be more or less per month than for the time previous to October 1st, 1897. That question you must determine from the evidence, and arrive at the amount of damages for the loss of the use of plaintiff's properties after considering all the evidence as to the probable condition and value of plaintiff's business, after October 1st, 1897, during the time the plaintiff lost the use of its properties, by reason of such attachments. You will also consider the time that may have been lost by the shutting down of the mill by breakage or otherwise; and if you believe from the evidence that the plaintiff had been able to continue in its business from April, 1893, to October 1st, 1897, with only such temporary interruption as is unavoidably incident to such business, then the presumption is that the plaintiff could have continued to carry on its business in the usual way, after October 1st, 1897, in the absence of evidence to the contrary; and the burden of proof is upon the defendant to establish to your satisfaction that the plaintiff could not have continued in business, even if the attachments had not been issued, and if the evidence does not overcome such presumption, then you will find against the defendant on this branch of the case.

On the following grounds, to wit:

(1.) Because it contained correct principles of law in respect to applying the past profits of the plaintiff's business as a guide to the jury in assessing damages for profits which the plaintiff was prevented from making by the issuing of the writs of attachment, and

39 (2.) Because it presented a correct principle of law respecting the burden of proof upon the issue embraced in said requested instruction;

And upon other grounds appearing on the face of said requested instruction.

Twelfth assignment of error. The court erred in refusing to give to the jury the following instruction requested by plaintiff, to wit:

In determining this question of the probability of plaintiff's being able to continue in business and in its usual course of business on and after October 1st, 1897, so far as any debts it then owed are considered, you will consider all the evidence; the amount and probable value of all its property and assets it then owed, including just claims and demands the plaintiff had against third parties, the condition of its business and of the lumber business at that time, and the probable condition of such business in the then future.

You will also consider the amount of debts plaintiff owed on Oc-

tober 1st, 1897, when they became due and payable, the means it had, and probably would have by the sale of lumber and otherwise to meet such debts; or to obtain an extension of time of payment of such debts; until the plaintiff could pay them from its business.

On the ground that it embraced a correct principle of law upon the measure of damages which the plaintiff was entitled to recover, and the plaintiff had the right to have the question of law embraced in said instruction submitted to the jury.

Thirteenth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

You have heard the evidence in respect to the magnitude and volume of the plaintiff's business for nine months and more prior to the date of the attachments, and in respect to the condition of that business on that day the attachments were levied; and it is your duty to weigh and consider the evidence carefully and deliberately in order to determine the value of the plaintiff's business for those nine months or more.

On the grounds following, to wit:

(1.) Because it contained a correct principle of law as to the measure of plaintiff's damages, and

(2.) Because the plaintiff had the right of having the evidence mentioned in said instruction submitted to the jury.

And on other grounds appearing on the face of said requested instruction.

40 Fourteenth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

If from the evidence you can ascertain with reasonable certainty the net income of the plaintiff's business for the nine months prior to these attachments, then you have a right to consider, and it is your duty to consider the amount of such net income for the said nine months as a basis and evidence upon which to estimate the amount the plaintiff's net income would have been after the time these attachments were levied, if these attachments had not been levied and continued on the plaintiff's property, and the plaintiff had continued in the usual course of business.

On the grounds following, to wit:

(1.) Because it contained a correct principle of law as to the measure of the plaintiff's damages, and

(2.) Because the plaintiff had the right of having the evidence mentioned in said instruction submitted to the jury.

And on other grounds appearing on the face of said requested instruction.

Fifteenth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

The net profits of the plaintiff's business prior to October 1st, 1897, you will consider with all the other evidence in estimating the amount of profits which you believe the plaintiff would have made after October 1st, said year, if these attachments had not been levied

upon the plaintiff's properties, and which you find that the plaintiff was prevented from making by the direct and proximate consequence and effect of issuing and levying these attachments.

And the period of time during which the plaintiff was so prevented from operating its mills and from making profits is for you to decide upon all the evidence of the case, and you are instructed that the testimony as to the profits of the plaintiffs business had not been excluded from your consideration.

On the grounds following, to wit:

(1.) Because it contained a correct principle of law as to the measure of the plaintiff's damages, and

(2.) The facts mentioned in said requested instruction were proper to be submiited to the jury for their consideration in estimating the damages which the plaintiff was entitled to recover.

And on other grounds appearing on the face of said requested instructions.

41 Sixteenth assignment of errors. The court erred in refusing to give to the jury the following instruction requested by the plaintiff to wit:

The court instructs you to award damages to the plaintiff which it sustained by reason or in consequence of the levy of the attachments upon all the timber and lumber and logs attached and to award such damages for the entire period of time the lien of said attachments remained and continued upon the timber and lumber and logs without and deductions from such damages from the fact that forthcoming bonds or indemnity bonds were given by the plaintiff.

If you find from the testimony that *these* (there) is not other satisfactory evidence of the amount of such damages for the time the liens of the attachment remained and continued operative upon such timber and lumber then you may allow the plaintiff eight per cent. interest per annum upon the market value of such timber and lumber from the time of the attachments to the time when the lien of such attachment was released and discharged from this property, or its proceeds in its business, free and clear of any lien of such attachments.

On the grounds following, to wit:

(1.) Because it embraced a correct proposition of law in respect to the measure of damages the plaintiff was entitled to recover, and

(2.) On the ground that the defendant was not entitled to the benefit of any advantage the plaintiff derived by the giving of forthcoming bonds,

(3.) Because the latter part of said instruction embraced a correct principle of law as to the measure of damages, to wit: interest on the value of the property detained from the possession of the plaintiff in consequence of the writs of attachment, without any deduction on account of the giving of any forthcoming or indemnity bonds.

Seventeenth assignment of error. The court erred in giving to the jury the following instruction, to wit:

The court instructs you to award damages to the plaintiff which it sustained by reason of or in consequence of the levy of the attach-

ments upon all the timber and lumber and logs attached and to award such damages for the entire period of time the lien of said attachments remained and continued upon the timber and lumber and logs, considering any deductions from such damages from the fact forthcoming bonds or indemnity bonds were given by the plaintiff.

On the grounds following, to wit:

(1.) On the grounds that the defendant was not entitled to
42 any mitigation of damages by reason of the plaintiff's giving forthcoming or indemnity bonds to the sheriff, and

(2.) Because it was not a duty plaintiff owed to defendant to give such bonds.

Eighteenth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

"If you believe from the evidence that the direct consequence of the said writs of attachment and the levying of the same upon logs and other properties of the plaintiff levied upon would have caused the suspension of the plaintiff's business for the period of time which it would have taken the said saw-mill to have sawn up said logs in the usual course of business, then the plaintiff is entitled to damages for the loss of the use of its said mill, and the suspension of its business during such period of time without any deduction or mitigation of damages from the fact that the plaintiff operated its mill and sawed up such logs with the consent of the sheriff or from the fact that the plaintiff gave an indemnity bond to the sheriff or a forthcoming bond."

On the grounds following, to wit:

(1.) Because it embraced a correct proposition of law upon the measure of damages the plaintiff was entitled to recover upon evidence before the jury; and

(2.) Because the defendant had no right to mitigate the plaintiff's damages sustained in consequence of the attachments by reason of any benefit the plaintiff derived under collateral contracts and arrangements made with the sheriff who served said writs of attachment, or with any other third party to whom the defendant was a stranger.

And on other grounds appearing on the face of said requested instruction.

Nineteenth assignment of error. The court erred in giving to the jury the following instruction, to wit:

"If you believe from the evidence that the direct consequence of the said writs of attachment and the levying of the same upon logs and other properties of the plaintiff levied upon would have caused the suspension of the plaintiff's business for the period of time which it would have taken the said saw-mill to have sawn up said logs in the usual course of business, then the plaintiff is entitled to damages for the loss of the use of its said mill, and the suspension of its business during such period of time considering any deduction or mitigation of damages from the fact that the plaintiff operated its
43 mill and sawed up such logs with the consent of the sheriff or from the fact that the plaintiff gave an indemnity bond to the sheriff, or a forthcoming bond."

On the grounds following, to wit:

(1.) On the ground that the law does not allow the defendant in this case any mitigation of damages on account of any benefits the plaintiff derived by the giving of indemnity bonds or forthcoming bonds, or from any other arrangement with the sheriff.

(2.) Because it was not a duty the plaintiff owed to defendant to give any indemnity or forthcoming bond to the sheriff.

Twentieth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

The giving of the indemnity bonds to the sheriff to enable the plaintiff to ship any part of the timber and lumber and account to the sheriff for its proceeds does not give the defendant in this suit any right to have the damages reduced that plaintiff sustained in consequence of such attachment.

On the grounds following, to wit:

(1.) On the ground that it contained a correct principle of law, and defendant was not entitled to any mitigation of damages because the plaintiff gave the sheriff indemnity bonds, and

(2.) Because by giving such bonds and taking such property into plaintiff's possession, plaintiff held the property as bailee for the sheriff and subject to his order.

Twenty-first assignment of error. The court erred in refusing to give the following instruction requested by the plaintiff, to wit:

The defendant's attorneys have during the trial of this cause announced that the Atlantic Lumber Company is under obligations to pay whatever judgment may be recovered in this case against The Fidelity & Deposit Company, the defendant here. The court instructs you that you will exclude entirely from your consideration such announcement by defendant's attorneys; and that you must not allow yourselves to be influenced in the slightest degree by any consideration as to who is liable to pay such judgment as may be recovered in this action. You have sworn to truly assess the damages in this action, and any failure to keep that oath would be a flagrant disregard of your duty as jurors.

On the grounds following, to wit:

(1.) Because the declaration by defendant's attorneys in
44 the said instruction mentioned was calculated to have an improper influence upon the jury.

(2.) That such declarations were improper and for the purpose of improperly influencing the jury.

(3.) Because said plaintiff had the right to have such declarations excluded from the consideration of the jury.

Twenty-second assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

While the attachments were pending it was not the duty of plaintiff's stockholders to raise and put new capital into its business in order to continue the same, or lessen the damages it might sustain in consequence of these attachments. The stockholders owed no such duty to defendant.

On the grounds following, to wit:

(1.) On the ground that it was not a duty the stockholders of the plaintiff owed defendant to put fresh capital into defendant's business to enable the plaintiff to continue in its business which was interrupted by the attachments, for the purpose of lessening the damages in consequence of such attachments.

And on other grounds appearing on the face of said requested instruction.

Twenty-third assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

In a civil case like this it is not necessary for you to find the existence of any fact beyond a reasonable doubt. It is sufficient to find any fact to be true, if the weight or preponderance of the testimony tends to establish such fact.

On the ground that it contained a correct principle of law as to the sufficiency of proof of any fact in a civil case.

Twenty-fourth assignment of error. The court erred in giving to the jury upon its own motion, the following instruction, to wit:

All these questions that have come in in regard to the damages; all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider; the only question is a clear-cut question, it is how much damages did the Bucki Company suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment.

At the time the writs of attachment were levied, there were
45 two common-law suits commenced both of which have been
-termined. That is one attending circumstance. The other is that the Atlantic Lumber Company cancelled its contract or considered it cancelled. That is the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs, and the common-law suits unite in being the cause for subsequent suffering of damages by the Bucki Company.

The law is distinct that where a party sets in motion a wrong, an intervening wrong will not prevent the party instituting or setting in force that wrong from being liable for all damages which can be directed to that.

But in this case, the attachments did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common-law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments.

If there is any question upon which the court considers a verdict would not be justified in any way in which it might be viewed, then it is the duty of the court to withdraw from the jury that question.

As I say that law is that all the damages that can be awarded against a surety on the new bond where there is no malice alleged, where a party merely becomes responsible for the direct damages that have been caused—the damages must be strict and positive.

Taking into consideration the several causes, contemporaneous-tending to interfere with the business of the Bucki Company, tending to injure their credit, or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in the case.

I have therefore, as you have seen, in the course of the case granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit. As I say, there was so much uncertainty, there was no certainty under the law for determining what damages have been suffered by the party in this case. I therefore instruct you gentlemen,
that the damages must be confined to the damages suffered
46 by the detention of the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff.

On the grounds following, to wit:

(1.) Because it contains incorrect principals of law.

(2.) Because the alleged contributory causes of damages, to wit: the bringing of the common-law suits by the Atlantic Lumber Company and ceasing to furnish logs by the Atlantic Lumber Company to the plaintiff were not admissible and could not legally be considered by the jury for the purpose of reducing damages sustained by reason of the writs of attachment.

(3.) If such contributory causes were admissible they should have been submitted to the jury together with the question of damages caused by the attachment.

(4.) Because it is no concern of the court that the jury might have difficulty in properly determining the amount of damages the evidence before the jury being legal evidence and sufficient to enable the jury to assess the damages.

(5.) Because the court had no right to take from the jury the question of the amount of damages sustained by the attachments because — the alleged contributory causes: the pendency of the common-law suits and the ceasing to deliver logs might have contributed to such damages.

(6.) Because upon the evidence before the jury there was reasonable certainty as to the amount of damages caused by the writs of attachment.

(7.) Because the following language in said instruction, to wit: "I therefore instruct you gentlemen that the damages must be confined to the damages suffered by the detention of the mill for the time being," was inconsistent with and repugnant to the preceding portion of the said charge.

(8.) Because the following language in said instruction, to wit: "As I say, that law is that all the damages that can be awarded against a surety on the bond where there is no malice alleged, where a party merely becomes responsible for the direct damages that have

been caused, the damages must be strict and positive," was calculated to mislead the jury as to the character of the evidence upon which they were to assess damages, and the words: "the damages must be strict and positive," were not justified by the law as to certainty of proof upon which the jury might estimate damages.

47 Twenty-fifth assignment of error. The court erred in refusing to give to the jury the following instruction requested by the plaintiff, to wit:

If the jury believe from the evidence that if these attachments had not been levied, the plaintiff had, or would have had and owned on October 1st, 1897, sufficient unencumbered property real and personal to have enabled it to supply its mill with logs and continue in business, then the fact that one of its drafts went to protest on June 2nd, 1897, and was paid the next day; and the fact that some of its drafts were protested between July 14th and August 15th, 1897, which were paid a few days after such protests, are entirely immaterial in this case upon the subject of its ability to have continued in business after October 1st, if these attachments had not been levied. The important question is what was its financial condition October 1st, 1897.

On the grounds following to wit:

(1.) Because it contained a correct principle of law, and

(2.) Because it was essential to enable the jury to properly apply the evidence in respect to the financial condition of the plaintiff on October 1st, 1897, when the attachments were issued and levied, and

(3.) Because the failure to pay, temporarily, one or more drafts previous to October 1st, should, in its effect have been explained to the jury by the court to have been immaterial.

Twenty-sixth assignment of error. The court erred in refusing to give to the jury the following instruction prayed for by the plaintiff, to wit:

It is in evidence that on the 6th day of February, 1899, the plaintiff's mill properties were sold by the sheriff of Duvall county on an execution issued on a judgment in favor of Schwaab for the sum of two thousand dollars, and the properties were purchased by one Henry Weiler. If you believe from the evidence that this sale was one of the direct consequences following these attachments, then the amount of damages should not be reduced because of such sale; in other words, if you believe from the evidence that the plaintiff incurred the indebtedness on which this judgment was recovered after October 1st, while engaged in a reasonable effort to do business, and that in consequence of such attachment, the plaintiff was not able to pay this debt and continue in business, then you will not diminish the amount of damages you award on the ground that such sale took place.

On the grounds following to wit:

48 (1.) Because it contained a correct principle of law, and plaintiff had the right to have submitted to the jury the question whether the alleged sale of its mill properties under an execution was the direct and proximate consequence of the said writ

of attachment, and if it was then that the damages which the plaintiff sustained should not have been reduced.

Twenty-seventh assignment of error. The court erred in refusing to give to the jury, the following instruction requested by the plaintiff, to wit: The court further instructs you that the plaintiff had the right to have the motions to dissolve the attachments heard and tried separately from the trial on the merits of the cases of The Atlantic Lumber Company against The L. Bucki & Son Lumber Company, and plaintiff was not obliged to wait until the issues on the merits of said cases had been made up before the said motions were tried; and in answering the question as to the amount of such attorneys' compensation you will not diminish such amount because at the trial of the said case on the merits subsequently had, some of the same questions of law and fact were involved on the trial of such cases on the merits as had been previously involved on the trial of the motions to dissolve the attachments; providing you find from the evidence that all the services rendered by such attorneys in preparing for the trial, and on the trial of such motions were caused and were the direct and proximate consequence of the issuing of such attachment.

On the grounds following, to wit:

(1.) On the ground that it contained a correct principle of law.

(2.) Because the plaintiff was not obliged to wait, under the laws of Florida, until the issues were made up on the merits of the case before trial on the motion to dissolve the attachment, and to have the motion and the said issues tried together.

(3.) Because a separate trial of the said motion had been adjudged to the plaintiff in the trial of the said suit by the Atlantic Lumber Company, and was *res judicata*.

(4.) On the ground that the amount of attorneys' fees for services rendered on the motion for the dissolution of the attachment and preparing for the trial of the same should not be diminished because some of the questions involved in said motion were also involved in the trial on the merits afterwards.

Twenty-eighth assignment of error. The court erred in giving to the jury of its own motion the following instruction, to wit:

49 "The defendant in this cause was not the original actor in bringing these suits, or suing out these attachments; they gave bond to pay all damages arising out of the improperly suing out of said attachments. A party has a perfect right to sue out an attachment by becoming liable to pay all damages; there is no law against it; it is not a tort; but he becomes responsible to pay all damages from the issuing of the attachment.

On the grounds following, to wit:

(1.) On the ground that the language of the said instruction was calculated to mislead and produce an erroneous impression upon the jury.

(2.) Because the defendant company was a party to the setting in motion of the attachment suits.

(3.) Because a party has not a perfect right to sue out an attachment by becoming liable to pay all damages; such right exists only

where a liquidated debt due or capable of liquidation by some definite rule, exists; and the Atlantic Lumber Company had no right to sue out an attachment under the laws of Florida by making affidavit that the plaintiff owed the said company seventy-five thousand dollars, basing such claim on profits it expected to make by further performing the contract.

(4.) Because issuing and levying an attachment is a tort if not sustained. It is not a contract or a crime, is unlawful and must be a tort.

Twenty-ninth assignment of error. The court erred in excluding and refusing to admit in evidence the written contract between the Atlantic Lumber Company and the plaintiff under which the logs were sold and delivered by the said company to the plaintiff, on the grounds:

(1.) Because the contents of said contract became material in the trial of the case; so much so that the court allowed oral testimony as to the contents of such contract to go before the jury, and

(2.) On the ground that said contract was the best evidence of the contents thereof.

Thirtieth assignment of error. The court erred in granting the motion made by the defendant after the testimony was closed in the case to exclude so much of the testimony as tended to prove the profits which the plaintiff had made in its business for several months prior to the date the attachments were levied, and in ruling and deciding on said motion that testimony as to injury to credit or loss of profits was too remote, uncertain and speculative to be considered by the jury, and in excluding all testimony as to
50 damages to credit and loss of profits, and in excluding all evidence relative to the market price of lumber subsequent to the attachments; and further erred in ruling and deciding on said motion that testimony as to profits be retained only for the purpose of determining the damages suffered between the first day of October, and the eleventh day of October, 1897, on the grounds:

(1.) That the plaintiff had the right to have submitted to the jury, the question whether or not the plaintiff could have continued in the usual course of business if those attachments had not been levied, and the amount of its profits the plaintiff lost by reason of such attachments, and

(2.) On the further ground that the declaration was framed and the trial proceeded to the close of the testimony, on the theory that it was proper for the jury to consider the profits of plaintiff's business prior to October, 1897, as a basis upon which to estimate profits lost after October 1st, 1897, and

(3.) On the further ground that such ruling took the plaintiff by surprise, and thereby it was prevented from proving elements of damages other than the loss of profits, which elements of damages would have been included in the loss of profits aforesaid.

Thirty-first assignment of error. And the court erred in refusing to grant the motion of the defendant to discharge the jury, and postpone the trial of the case as set forth in the bill of exceptions, on the grounds:

(1.) That the ruling of the court excluding testimony as to profits made prior to October, 1897, and all testimony as to injury to credit by reason of the attachments, took the plaintiff by surprise, and thereby deprived the plaintiff from proving elements of damages which were included in the damage by loss of profits and damage to credit, and which said other elements of damages the plaintiff could have proven and would have proven had the plaintiff not been misled by the ruling of the court allowing testimony to be adduced establishing loss of profits and loss of credit, and the profits of plaintiff's business prior to October 1st, 1897.

And on other grounds appearing on the face of said motion.

Thirty-second assignment of error. The court erred in excluding all evidence as to profits made by the plaintiff prior to October 1st, 1897, except for the period of time between Oct. 1st and Oct. 11th, 1897, on the ground that the court excluded such testimony on the theory that the common-law suits in which the attachments were issued and the ceasing of the Atlantic Lumber Company to deliver any more logs after the 1st of October, were causes contributory to the damages sustained by the issuing of the attachments and it was not proper to submit to the jury the question as to how much damage the writs of attachment caused, because the jury would be unable to separate and distinguish the damages caused by the writs of attachment, and those caused by the common-law suits and ceasing to deliver logs. This was error on the following grounds, to wit:

51

(1.) Because such alleged contributory causes were not admissable to go before the jury.

(2.) If admissable to go before the jury, they should have been submitted to the jury together with the damages caused by the attachments, and the jury should have been instructed that the said contributory causes must have produced the same damages if no attachments had been issued, as were produced by the issue of the attachments; otherwise that the jury should not diminish the damages in consequence of said contributory causes.

Thirty-third assignment of error. The court erred in excluding the written contract between John N. C. Stockton and Charles L. Bucki, which is in the bill of exceptions, on the grounds following to wit:

(1.) On the ground that the said contract was the best evidence of the relations that existed between the said Stockton and Bucki, in the year 1898, and a part of the necessary evidence for the jury to determine whether or not the plaintiff derived any benefit from the operation of the plaintiff's mills during any part of the year 1898.

And on other grounds appearing on the face of said contract.

Thirty-fourth assignment of error. The court erred in refusing to exclude the testimony of one Bion Barnett, cashier of the National Bank of Jacksonville, who was examined for the purpose of establishing his opinion as to the credit the plaintiff would have under the circumstances stated in the testimony set forth in the bill of exceptions, which was error,

(1.) Because such testimony was not admissable as expert testimony, and

(2.) Because the question of credit which the plaintiff would have upon the testimony before the jury was a question exclusively for the jury, and of which they were the proper judges, and of which they were as capable of judging as Mr. Barnett.

Thirty-fifth assignment of error. The court erred in excluding from the judgment the sum of seven thousand five hundred
52 dollars which the jury found specially in their verdict, as a reasonable compensation for plaintiff's attorneys for services rendered on the trial of and preparing for the trial of the motion to dissolve the attachment.

This was error on the following grounds, to wit:

(1.). Because the amount of reasonable attorney's fees was an element of the damages sustained by the attachments,

(2.) Because it was a question of local law arising upon a statute of Florida authorizing the issue of attachments, and providing the condition of the bond upon which attachments can issue.

(3.) Because the supreme court of Florida had previously decided that reasonable attorney's fees on such a motion are proper elements of damages, and such decisions of the supreme court of Florida were obligatory upon the Federal court.

Thirty-sixth assignment of error. The court erred in excluding from the jury, the testimony which had been read in evidence, of Alfred J. Rothero, book-keeper of the Degnon-McLean Construction Company, as stated in the bill of exceptions. This was error on the following grounds, to wit.

(1.) One of the elements of damages claimed in the declaration was the loss sustained by reason of the attachments disabling the plaintiff from delivering certain timber and lumber to the Degnon-McLean Construction Company, which timber and lumber the said company bought in New York city, and charged plaintiff with the difference between the price at which the plaintiff had sold it to said company, and the price which the said company had to pay for such timber and lumber; and the testimony of the said book-keeper established that such charges were made against the plaintiff. The court excluded the said testimony on the ground that while the said book-keeper made the entries in the books, to which he testified and to their correctness, and that they were made in the usual course of business, he did not know of his own knowledge that the items of the charges were correct, for such items of charges were handed in to him as such book-keeper by other employés of the Degnon-McLean Construction Company.

This was error on the grounds following, to wit:

(1.) On the ground that such items being furnished the book-keeper, and being entered in the books in the usual course of business of any established business concern are presumptively correct and *prima facie* admissible.

Thirty-seventh assignment of error.

Also the words "traveling expenses of the officers and
53 agents of plaintiff to attend court and in preparing for the trial of said motion to dissolve the said attachment;" the said

attachment proceedings having been published in daily newspapers of large circulation, to-wit: in the Times-Union and Citizen and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers, on the fourteenth page of the said record, and in the eighth paragraph of the first count of said declaration.

And the words "traveling expenses of the officers and agents of plaintiff, to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out large sums of money as" and the words "and attorney's fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money as attorney's fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the improper issuing of the said writ and the levy thereof, as aforesaid, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business aforesaid, for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to-wit: in the Times-Union and Citizen, and in the Metropolis both being newspapers published in the said county of Duval, and "in other papers" in the twenty-third and twenty-fourth pages of said declaration.

On the grounds following, to-wit:

(1.) The clauses and paragraphs above mentioned, and stricken — and not restored to the declaration, state items of damages that the plaintiff could have proven, and offered to prove, and damages that were sustained in consequence of the writs of attachment, and

(2.) On the further ground that the effect of, and damages in consequence of the levy of the writs of attachment are questions of fact for the determination of the jury, and plaintiff has a constitutional right to have such questions submitted to the jury, and on the further ground

(3.) That it is impossible for the court to determine that any item of damages is not the direct and proximate result of the levying of the attachments, and is too remote, before it has heard all the evidence and has before it all the facts and circumstances showing the injury and damage the plaintiff sustained.

(4.) On the further ground that the plaintiff and its counsel believe that the learned circuit court was misled to make the order striking out said parts of the declaration, and to make its
54 ruling and decision declining to reinstate said parts of the declaration, by dicta and decisions of courts in cases which from their facts and circumstances have no application to this action.

Know all men by these presents, That we, Charles Lloyd Bucki, and Horatio Bisbee, are held and firmly bound unto the Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of Maryland, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed this fifteenth day of March, A. D. 1900.

The condition of the foregoing obligation is such, that whereas L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, has sued out a writ of error from a judgment of the circuit court of the United States, in and for the southern district of Florida, rendered on the eighth day of February, A. D. 1900, in a certain cause therein lately pending, wherein the said L. Bucki & Son Lumber Company was plaintiff and the said The Fidelity & Deposit Company of Maryland was defendant returnable to the United States circuit court of appeals on the second day of April, A. D. 1900. Now if the said L. Bucki & Son Lumber (Company) shall prosecute its said writ of error to effect, and if it fail to make its plea good shall answer all costs, then this obligation shall be null and void, else to remain in full force and virtue.

CHAS. LLOYD BUCKI. [SEAL.]
HORATIO BISBEE. [SEAL.]

Upon consideration, the foregoing bond is approved and writ of error therein mentioned allowed. In open court this 15th day of March, 1900.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Bond on writ of error. Filed Mar. 15th, 1900. E. O. Locke, clerk.

55 In the Circuit Court of the United States for the Southern District of Florida, December Term, 1899.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Be it remembered, that at a term of the circuit court of the United States for the southern district of Florida, began and held in Jacksonville, in said district, on Monday, the fourth day of December, in the year of our Lord one thousand eight hundred and ninety-nine, a cause therein pending, wherein L. Bucki & Son Lumber Company, a corporation organized under the laws of the State of New Jersey, was plaintiff and The Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, was defendant, came on to be heard before the Honorable James W. Locke, a judge of the said circuit court, at which day came the said parties by their respective attorneys. And thereupon, the said issues, in manner aforesaid joined between the said parties came on to be tried, and the jurors of the jury aforesaid, whereof mention is within made, being called, likewise came and were sworn to try the said issues in manner aforesaid joined, and thereupon the plaintiff, to maintain the issues on its part, produced and offered and read in evidence the affidavits and writs of attachment set forth in the two counts of the declaration, and the return of the sheriff on

the said writs, and the return on the said writ mentioned and set forth in the first count of the said declaration was in the words and figures following, to wit:

Received this writ on the 1st day of October, A. D. 1897, at 6.25 p. m. N. B. Broward sheriff, by R. H. McMillan. And executed the same in the county of Duval, Florida, on the first day of October A. D. 1897, by levying upon and taking into my possession one million two hundred and fifty thousand feet of yellow-pine merchantable lumber belonging to the defendant L. Bucki & Son Lumber Company, at its mill site in the city of Jacksonville, county of Duval, State of Florida.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. McMILLAN, *Deputy.*

On the 11th day of October, 1897, I delivered the attached
56 porperty to the defendant upon receiving and approving a forthcoming bond in accordance with the statute.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. McMILLAN,
Deputy Sheriff.

And the return of the said writ of attachment mentioned and set forth in the second count of the said declaration was in the words and figures following, to wit:

Received this writ on the first day of October A. D. 1897, at 6.25 o'clock p. m., and executed the same in the county of Duval, Florida, on the 1st day of October A. D., 1897, by levying on and taking into my possession the personality and levying on the realty as particularly set forth by the description hereto attached. On the 4th day of November, A. D. 1897, I delivered the attached personal property to the defendant upon receiving and approving a forthcoming bond in accordance with the statute.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. McMILLAN,
Deputy Sheriff.

(On the attached description sheet.)

The certain lands lying, being and situate in Duval county, Florida, described as follows, to wit: All that tract of land being situate in Jacksonville, Florida, being a part of the Barton donation in Duval county, beginning at a cedar post standing on the west bank of the St. Johns river, where a fence now stands on the north side of land owned by Adonizad S. Welch and running on a line with said fence westward until it intersects the east branch of Deer creek, thence along the course of said creek to the St. Johns river, thence along said river to the place of beginning, containing about ten acres, in section forty-eight, township two, south range twenty-seven east, being the same premises conveyed by Eben Hunting to

the L. Bucki & Son Lumber Company by deed dated December 16th, 1893, recorded in book 89, folio 463, and also conveyed to said Eben Hunting by David Wilson and Caroline Wilson by deed dated May 2nd, 1899, recorded in deed book B. Z., folio 752. The foregoing description being intended to embrace all of the parcel of land occupied by the L. Bucki & Son Lumber Company as a mill site, mill premises and lumber yard in Jacksonville, Florida. Together with all and singular the ways, woods, waters, riparian rights, wharves, docks, buildings, erections, fixtures and machinery thereon erected, and structures, and all the appurtenances thereunto
57 belonging, or in anywise appertaining, including also the trucks, implements and various furnishings used along with and as a part of the mill property.

One covered lighter 100 x 27 feet; two lighters 100 x 27 feet each; three mules and carts; all the round timber or logs, about 3,000,000 feet; and the certain sawn lumber measured at 3,508,920 feet; the same each and every being found and now held at and about and in the waters adjacent to, the mill site above described.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. McMILLAN,
Deputy Sheriff.

And the testimony tended to establish that the actual quantity of timber and lumber levied on by the sheriff (before the said logs were sawn) was upward of 5,200,000 feet.

And the plaintiff read in evidence the motions to dissolve the said writs of attachment, and the judgments of the said circuit court of the United States dissolving the said attachments, which said motions and said judgments are in the words and figures following, to wit:

"Comes now the defendant by H. Bisbee, its attorney and moves a dissolution and dismissal of the writ of attachment in the above-entitled action on the following grounds:

"First. Because there are no facts stated in the affidavit upon which the attachment was based, establishing that the plaintiff had any lien upon any of the property mentioned in the affidavit, which appears from the reading of the affidavit itself.

Second. Because it is an action at law to enforce a statutory lien, the right to an attachment upon the property upon which the lien is claimed is not given by the statute of this State.

Such right to attachment is only given when suit is brought by bill in equity to enforce the lien.

Third. Because it does not appear from the face of the bond given in this action, nor from the record, that the said bond is a legal and valid bond required by the statute in such case made and provided.

(*a.*) Because the name of the surety given and described in the body of the bond is not identical with the name of the surety signing the bond.

(*b.*) Because it does not appear from the face of the bond nor from

the record, that the surety who signed the bond had the requisite legal authority to do business in the State of Florida, or to sign said bond.

58 (*c.*) Because it does not appear from the face of the bond, nor from the record, in what capacity D. U. Fletcher claims to have acted in signing the name of the surety to the bond, nor that he was authorized to sign it.

(*d.*) Because the body of the bond is printed on a typewriter and the words "Frank H. Elmore, agent for" are interlined in manuscript in the first line and in the seventh line without any note at the bottom of the bond that the same was done before execution.

(*e.*) Because the words "agent for" are not equivalent of the words, "as agent for" and it does not appear on the face of the bond that Elmore in giving the bond acted as agent for the plaintiff.

Because the bond does not bind the heirs, executors and administrators of Elmore.

(*g.*) Because the bond recites the issuing of a writ of attachment against the goods and chattels, lands and tenements generally of the defendant, and the condition of the bond is to pay costs and damages for the improperly issuing of such a writ of attachment, and such a writ of attachment never was issued.

(*h.*) The writ of attachment actually issued only authorized the sheriff to levy on the property described in the affidavit, and there is no bond whatever conditioned for the improperly issuing of the writ of attachment actually issued.

Fourth. For divers other good and sufficient reasons appearing on the face of the affidavit and of the record.

If the court denies the motion to dissolve the attachment upon any of the grounds hereinbefore stated, then the defendant moves to dissolve the attachment and dismiss the writ upon the ground that the averments of facts traversed by the defendant's affidavit are not true, either as to the debt due or the grounds of attachment.

Wherefore defendant prays the judgment of the court.

Oct. 20th, 1897.

H. BISBEE,
For Defendant.

(Indorsed:) Motion to dissolve attachment. Filed Oct. 23rd, 1897. E. O. Locke, clerk.

59 *Order Dissolving Attachment.*

THE ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY. } No. 1.

This action was heard on motion by defendant to dissolve the writ of attachment therein and upon motion of plaintiff to amend the affidavit and declaration herein and was argued by counsel.

Upon consideration thereof, it is ordered that the said motion to amend be denied inasmuch as it is considered that amendments presented do not cure the defects of the original pleadings and the

said writ of attachment be and is hereby dissolved, and that the property levied on by virtue of that writ be surrendered up to the possession of the defendant.

Done in open court this 1st day of November, 1897.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Order dissolving attachment, filed Nov. 2nd, 1897. E. O. Locke, clerk.

THE ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY.

Comes now the defendant by H. Bisbee, its attorney, and moves the court for an order dissolving the attachment in the above-entitled action upon the following grounds appearing on the face of the declaration filed January 7th, 1898, and other parts of the record in the case.

First. Because the cause of action in the first count of the said declaration is for the price of logs delivered, for which the plaintiff brought suit and obtained another attachment, which has been since dissolved by order of this court.

Second. Because the second count of the said declaration including its subdivisions six common counts, taken in connection with the bill of particulars filed therewith show no cause of action for the sum of seventy-five thousand dollars, and no ground for a writ of attachment of $75,000.

Third. The third, fourth, fifth, sixth, seventh and tenth counts in the said declaration and neither of said counts states any cause of action which is or can be made, a basis for an affidavit and writ of attachment in the sum of $75,000.

(*a.*) Each of said last-mentioned counts is for unliquidated
60 damages of too indefinite, uncertain and speculative character to form the basis for a writ of attachment in the sum of $75,000.

(*b.*) Because none of said last-mentioned count- states a breach of the contract on the part of the defendants.

(*c.*) Because each of said counts sets forth a breach by the plaintiff before the said alleged breach by the defendant.

(*d.*) Because it appears in each of said counts that the written contract set forth therein was abandoned by the plaintiff with the consent of the defendant.

2. Because all of said counts in the declaration are repugnant and irreconcilably inconsistent and double, and uncertain in their allegations.

Fourth. That no cause of action is stated in the eighth and ninth counts which could form a basis for an affidavit in attaching the sum of $75,000.

(*a.*) Because on the 4th of October, 1897, plaintiff sued the defendant in the circuit court of Duval county for the identical cause of action set up in the eighth and ninth counts in which action writ

of attachment issued and levy was made by the sheriff of said county to secure the sums of money in the said count stated, which said suit is still pending, and which said attachment is in full force and effect.

Fifth. Because neither the 11th or 12th counts of said declaration show any cause of action which is or could be made basis of an affidavit in attachment in the sum of $75,000.

Sixth. The said declaration and all the counts therein do not show a cause of action which is or can be made the basis of an affidavit or writ of attachment in the sum of $75,000.

Seventh. For other causes appearing on the the face of said declaration and each and every count thereof.

Eighth. On the ground that the bond given for the writ of attachment for the sum of $75,000 in the sum of $150,000 is not a good bond on the face thereof, and for divers reasons appearing on the face thereof.

(*a.*) For the reason that the description of the surety in the body of the bond is different from the description of the surety in its signature to the bond.

(*b.*) Because neither the bond, nor any paper attached thereto shows that the surety to the bond had obtained the certificate under the laws of the State of Florida to do business in the State of Florida.

(*c.*) Because it does not appear from the face of the said bond that D. U. Fletcher was the agent, or had any authority, as the agent of the surety to sign its name to the said bond.

61 Please take notice that the above motion will be made Monday, the 10th day of January, 1898, at ten o'clock a. m., or as soon thereafter as the court can hear the motion.

To R. H. Liggett, Esq., attorney for plaintiff.

H. BISBEE,
Def't's Att'y.

(Indorsed:) Motion to dissolve attachment. Filed this 10th day of Jan., 1898. E. O. Locke, clerk, by Louis Starke, deputy.

In the Circuit Court of the United States, Southern District — Florida.

THE ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY.

On motion of the defendant in this action to dissolve the writ of attachment for the sum of seventy-five thousand dollars upon issues of fact raised upon the formal pleadings made and filed herein, the court does not find that the defendant was indebted to the plaintiff in the sum of seventy-five thousand dollars on the 1st day of October, A.D. 1897. It is therefore ordered by the court the said writ of attachment be and the same is hereby dissolved and dismissed and that the property upon which the said writ was levied be restored to the defendant, and the defendant recover his costs in this behalf

expended, taxed at $407.65, to which ruling and order plaintiff excepts.

JAMES W. LOCKE, *Judge.*

March 14th, 1898, Jacksonville, Florida, as of February 14th, A. D. 1898.

(Indorsed:) Order on motion to dissolve attachment as amended by order of March 14th, 1898. Filed Mar. 14th, 1898. E. O. Locke, clerk.

And the plaintiff, by its attorney, offered and read in evidence its motion for a separate trial of the said motion to dissolve the attachment for seventy-five thousand dollars, and the order on said motion, which said motion and said order are in the words and figures following, to wit:

ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY.

Now comes the defendant by H. Bisbee its attorney, and moves the court for a continuance of the above-entitled action on
62 the merits of the case until the spring session of this court and for an order directing that the motion to dissolve the attachment on issues of fact be tried separately from the action on merits upon the following grounds, to wit:

First. The trial of the action on the merits and the motion to dissolve the attachment upon issues of fact made in said action cannot be legally tried at one and the same time, either by a jury or by the court.

Second. The defendant has an absolute legal right to have a trial of a motion for a dissolution of the attachment had separately from a trial of the case on its merits.

(*a.*) Because on a trial the trial of a motion to dissolve, the merits of the action cannot be gone into, the question on such motion being not whether the defendant owes the plaintiff anything, but whether the defendant owes the plaintiff the amount sworn to in the attachment affidavit, and whether any of the special causes sworn to in the affidavit are true.

(*b.*) Because on motion to dissolve the attachment on issues of fact, the jury are sworn to try a different issue that when they are sworn to try the case on the merits, and if sworn to try both issues it would tend to confuse the jury and would require two separate and distinct verdicts, one of which might be a verdict for the defendant and the other verdict for the plaintiff.

(*c.*) If the motion to dissolve the attachment, and the cause on the merits are tried at one and the same time, and a verdict should be rendered for the defendant on the trial of the motion, and for the plaintiff on the trial of the merits, there is no way to apportion the costs in taxing same in respect to the two trials. From the number of witnesses already subpœnaed in this case, the costs amounting to about one hundred dollars per day.

(*d.*) Because on the trial of the motion to dissolve on issues of fact the verdict of the jury is either for the plaintiff without stating any sum of money or for the defendant. If for the plaintiff the only judgment rendered is an order denying the motion to dissolve with costs; if for the defendant, an order dissolving the attachment with costs.

Third. The trial of the motion to dissolve the attachment on issue of fact, and the judgment thereon is not *res judicata* on any question which may arise on the trial of the merits of the case, and has no effect upon the issue on the merits of the case than any other judgment in collateral motion made in an action before trial on the merits:

(*a.*) The issues of fact tried on motion to dissolve the attachment are different issues of fact than those on the trial of the merits,
63 and the seventh amendment of the Constitution has no application to such trial of the motion to dissolve.

Fourth. Because the issues in the action on the merits are not made up, and if they were made up, the defendant is not ready for trial on the merits.

(*a.*) The last declaration was filed on the 7th day of January, 1898, and was filed *ex parte* without notice, and without any order of the court and defendant has until the first Monday in February next to file pleas to the declaration on the merits.

(*b.*) Until all the issues of fact are made up on the merits of the case, the court is without any jurisdiction to try the same on the merits.

(*c.*) Because it would be unreasonable to force a party to trial immediately upon the issues being made up in view of the history of this case, especially so in view of the multiplicity of the questions of fact and of law that have arisen and will arise in it.

Fifth. For divers other reasons appearing on the face of the record and proceedings in the case.

Sixth. On the ground of the absence of material witnesses, some of *which* reside out of the State, to wit: in the State of New York, and documentary evidence in the State of New York which defendant has not procured, and the attendance of which witnesses the defendant has not procured, nor the depositions of said witnesses, because the defendant relied upon the right by statute to trial upon motion to dissolve the attachment without going to trial on the merits of the case at the same time.

Seventh. Because two actions are pending between the same parties, and only one declaration has been filed, one action commenced by affidavit in attachment on the 1st of October, 1897, and the other by pracipe for summons on the second of October, 1897, and the second action can embrace a cause of action, to wit: on the amount due on the last installment of logs before this suit was brought, which amount cannot be made a basis of attachment on the first of October aforesaid.

H. BISBEE,
Attorney for Def't.

Received a copy of foregoing motion this 20th of January, 1898.

R. H. LIGGETT,
Plaintiff's Attorney.

ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY.

Please take notice that on Friday, the 21st day of January,
64 1898, at ten o'clock a. m., or as soon thereafter as the court can hear the motion, I shall call up the foregoing motion for action by the court thereon.

H. BISBEE,
Attorney for the Defendant.

To R. Liggett, attorney for plaintiff:

Service of the foregoing motion accepted this 20th of January, 1898.

R. H. LIGGETT,
Of Counsel for Plaintiff.

(Indorsed: Motion for continuance and separate trial of motion to dissolve. Filed Jan. 21st. E. O. Locke, clerk, by Louis Starke, deputy.)

Order upon Motion for Continuance and Separate Trial of Motion to Dissolve.

THE ATLANTIC LUMBER COMPANY
vs.
L. BUCKI & SON LUMBER COMPANY.

This cause coming on to be heard upon motion of defendant for the continuance of the entitled action on the merits of the case, until the spring session of this court, and for an order directing that the motion to dissolve the attachment on issues of fact be tried separately from the action on the merits, and having been fully heard and submitted by counsel, it is ordered that said motion be granted.

Done and ordered in open court this 21st day of January, 1898.

JAMES W. LOCKE, *Judge.*

To which ruling the plaintiff excepts.

JAMES W. LOCKE, *Judge.*

(Indorsed: Order granting motion for continuance and for separate trial of cause on motion to dissolve. Filed Jan. 21, 1898. E. O. Locke, clerk.)

And plaintiff also read in evidence writ of error from the United States circuit court of appeals for the fifth circuit to review the said judgment dissolving said attachment for $75,000, and the bond given on the said writ of error, which were in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the fifth circuit, southern district of Florida, Greeting:

Because in the record and proceedings, as also in the ren-
65 dition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Atlantic Lumber Company, plaintiff and L. Bucki & Son Lumber Company, defendant, a manifest error hath happened, to the great damage of the said The Atlantic Lumber Company as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under you (your) seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning same, to the U. S. circuit court of appeals, fifth circuit, together with this writ, so that you may have the same at New Orleans, La., on the 24th day of May, 1898, in the said circuit court of appeals *court*, to be then and there held, *and* the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 25th day of April, in the year of our Lord, one thousand eight hundred and ninety-eight.

EUGENE O. LOCKE,
Clerk U. S. Circuit Ct., So. Dist. of Florida.

Allowed by:
JAMES W. LOCKE,
U. S. Judge.

(Indorsed:) Copy of writ of error. Deposited for defendant in error. Filed April 25th, 1898. E. O. Locke, clerk.

Know all men by these presents, that the Atlantic Lumber Company, a corporation organized and existing under the laws of the State of Florida, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, duly authorized under the laws of the State of Florida to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki & Son Lumber Company, a corporation under the laws of the State of New Jersey, in the sum of fifteen hundred dollars, for the payment whereof, well and truly to be made, they do bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed on the 25th day of April, A. D. 1898.

The condition of the foregoing obligation is such that whereas the said The Atlantic Lumber Company, the principal above named, has sued out a writ of error from a judgment of the circuit court of

the United States for the southern district of Florida, ren-
66 dered on the 14th day of February, 1898, dissolving an attachment in favor of the said principal against the said L. Bucki and Son Lumber Company, to the circuit court of appeals for the fifth circuit of the United States, returnable before the said court of the 25th day of May, 1898, now if the said principal shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

[SEAL.] THE ATLANTIC LUMBER CO.
ARTHUR MEIGS,
General Manager and Treasurer.
R. H. LIGGETT, *Secretary.*
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By D. U. FLETCHER, *Att'y-in-Fact.*
[SEAL.] R. BOWEN DANIEL, *Gen'l Agent.*

Attest:
Approved April 25th, 1898.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Supersedeas bond. Filed April 25th, 1898. E. O. Locke, clerk.

And the plaintiff read in evidence the judgment of the said United States circuit court of appeals affirming the said last-mentioned judgment, which was rendered on the — day of ——, A. D. 1899, and was in the words and figures following, to wit:

"And whereas in the present term of November, in the year of our Lord, one thousand eight hundred and ninety-eight, the said cause came on to be heard before the said United States circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered and adjudged by this court, that the writ of error sent out from the judgment of the said circuit court in this cause be and the same is hereby dismissed.

It is further ordered and adjudged that the plaintiff in error, The Atlantic Lumber Company, and the surety on the writ of error bond herein, The Fidelity and Deposit Company of Maryland, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

January 3rd, 1899."

67 And plaintiff read in evidence the judgment in its favor and against the Atlantic Lumber Company, rendered by the said circuit court of the United States in the words and figures following, to wit:

The jury having found a verdict for the defendant upon the 3rd, 4th, 5th, 6th, 7th, 10th and 11th counts of the declaration, it is considered by the court that the defendant go hence without day upon the said counts and that the defendant to have and recover of and

from the plaintiff its costs in this behalf expended to be taxed by the clerk of this court.

Which said judgment was upon the merits in the said suit in which the said writ of attachment for $75,000 was issued.

And plaintiff read in evidence the writ of error from the said United States circuit court of appeals to review said judgment, whereby the said suit was removed to the said court of appeals and the bond given on the said writ, and the order of the circuit court upon allowing the said writ, which said writ of error and said bond and said order were in the words and figures following, to wit:

"The President of the United States to the honorable the judges of the circuit court of the United States for the fifth circuit, southern distict of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Atlantic Lumber Company, a corporation, plaintiff, and The L. Bucki & Son Lumber Company, a corporation, defendant, a manifest error hath happened to the great damage of the said The Atlantic Lumber Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of appeals of the United States, fifth circuit, together with the writ, so that you may have the same at New Orleans, La., on the sixth day of August, 1898, in the said circuit court of appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eigth day of July, in the year of our Lord, one thousand eight hundred and ninety-eight.

EUGENE O. LOCKE,
Clerk U. S. Circuit Court, Southern District of Florida.

68 Allowed by:
JAMES W. LOCKE, *Judge.*

(Endorsed:) Copy of writ of error lodged with the clerk, circuit court, for defendant in error. Filed July 8th, 1898. E. O. Locke, clerk.

Know all men by these presents, that the Atlantic Lumber Company, a corporation organized and existing under the laws of the State of Florida, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the

laws of the State of Maryland, and duly authorized under the laws of the State of Florida, to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, in the sum of fifteen hundred dollars for the payment whereof well and truly to be made, they bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed on this the 5th day of July, A. D. 1898.

The condition of the foregoing obligation is such that, whereas the said The Atlantic Lumber Company, the principal above named, has sued out a writ of error from a judgment of the circuit court of the United States, in and for the southern district of Florida, rendered on the 7th day of May, 1898, in favor of the defendant and against the plaintiff upon certain causes of action set forth in the plaintiff's declaration in said cause, to the circuit court of appeals for the fifth circuit of the United States, returnable before the said court on the 6th day of August, 1898, now if the said principal shall prosecute said writ of error to effect, and answer all damages and costs if it shall fail to make its plea good, then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

THE ATLANTIC LUMBER COMPANY,
By ARTHUR MEIGS, *General Manager.*
FIDELITY & DEPOSIT CO. OF MARYLAND,
[SEAL.] By D. U. FLETCHER, *Att'y-in-Fact.*

Attest: R. H. LIGGETT,
As Secretary of the Atlantic Lumber Company.
Attest: R. BOWEN DANIEL,
[SEAL.] *General Ag't Fidelity & Deposit Co. of Maryland.*

Approved July 8th.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Supersedeas bond. Filed July 8th, 1898. E. O. Locke, clerk.

69 Upon consideration of the foregoing petition of the plaintiff for a writ of error from the final judgment entered in this cause on the 7th day of May, 1898, and upon its application that the said writ of error shall have the effect and operate as a supersedeas of the judgment heretofore entered in this cause on the 14th day of February, 1898, dissolving the attachment number two, issued therein in favor of the plaintiff, it is ordered that the said plaintiff be allowed a writ of error from the aforesaid final judgment entered in this cause on the 7th day of May, 1898, and also a citation to the defendant. And it further appearing to the court that the said plaintiff formerly sued out a writ of error to the United States circuit court of appeals for the fifth circuit, from the judgment heretofore rendered on the 14th day of February, 1898, dissolving the said attachment, and that the court made an order that the said

writ of error should operate as a supersedeas of the said judgment, upon the said plaintiff filing a bond with sufficient security, to be approved by the court, in the sum of fifteen hundred dollars, conditioned according to law, that the plaintiff should prosecute said writ of error to effect, and answer all damages and costs, if it should fail to make its plea good, and that the said plaintiff duly complied with the said order of the court for supersedeas of the said judgment dissolving the said attachment and duly perfected the said writ of error within the time prescribed by law, in which a writ of error may be a supersedeas, whereby the operation of the said judgment of the court, dissolving the said attachment, was suspended, and it further appearing to the court that there is some doubt as to whether or not the aforesaid judgment of the court, dissolving said attachment, was a final judgment, within the meaning of the act of Congress, authorizing a writ of error therefrom, and the court by the aforesaid order for supersedeas, which was complied with, having suspended the operation of the said judgment dissolving the said attachment, it is now ordered by the court that the writ of error hereby allowed by the court from the final judgment of the court aforesaid, rendered on the 7th day of May, 1898, shall operate as a supersedeas of the aforesaid judgment of the court dissolving the said attachment, heretofore rendered on the 14th day of February, 1898, upon the plaintiff filing a bond, with a good and sufficient security, to be approved by the court, in the sum of fifteen hundred dollars, conditioned that it shall prosecute the said writ of error, hereby allowed, to effect, and answer all damages and costs, if it shall fail to make its plea good.

Ordered in open court at Jacksonville, Florida, on this 8th day of July, 1898.

JAMES W. LOCKE, *Judge.*

70 (Indorsed): Order allowing writ of error. Filed May 8th, 1898. E. O. Locke, clerk.

And then the plaintiff *then* read in evidence the judgment of the said United States circuit court of appeals affirming the said last-mentioned judgment, which was rendered on the 3rd day of January, A. D. 1899, and was in the words and figures following, to wit:

"And whereas, in the present term of November, in the year of our Lord, one thousand eight hundred and ninety-eight, the said cause came on to be heard before the said United States circuit court of appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause, in respect to the writ of error sued out herein, be, and the same is, hereby affirmed, without prejudice to the writ of error now pending in this court in cause No. 783 between the same parties.

It is further ordered and adjudged that the plaintiff in error, The Atlantic Lumber Company, and the surety on the writ of error bond herein, The Fidelty & Deposit Company of Maryland, be condemned

to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

January 3rd, 1899."

And thereupon, the plaintiff proved by undisputed evidence that the said The Atlantic Lumber Company applied to the Supreme Court of the United States for leave to file a petition for a writ of certiorari from the said court to review the said judgment of the said circuit court of appeals, and by like undisputed evidence that the said Supreme Court denied leave to file such petition on or about the 22nd day of May, A. D. 1899.

And thereupon the plaintiff read in evidence two forthcoming bonds and two indemnity bonds, in the words and figures following, to wit:

THE ATLANTIC LUMBER COMPANY, Plaintiff,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant.

Know all men by these presents, That we, L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of New Jersey, as principal, and Charles L. Bucki and Frederika Bucki and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of Maryland,
71 and which has obtained a certificate under the laws of Florida authorizing it to do business as a surety company, under and by virtue of the laws of Florida, as sureties, are held and firmly bound unto the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, in the sum of one hundred thousand dollars, for the payment whereof well and truly to be made, the said L. Bucki & Son Lumber Company binds itself, its successors and assigns, and the said The Fidelity and Deposit Company of Maryland binds itself, its successors and assigns, and the said Charles L. Bucki, and the said Frederika Bucki, bind themselves, their and each of their heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed this the 4th day of November, A. D. 1897.

Now, the condition of this obligation is such that, whereas, the sheriff of Duval county, Florida, by virtue of a certain writ of attachment issued out of the circuit court of Florida in and for Duval county, in a certain cause then and therein pending, wherein the said The Atlantic Lumber Company was plaintiff and the said L. Bucki & Son Lumber Company was defendant, has levied upon the following property, to wit: 4,983,920 feet of sawn lumber and timber and 3,000,000 feet of round timber, not sawn, all of the value of fifty thousand dollars, fixed by the sheriff of Duval county, Florida, and the said L. Bucki & Son Lumber Company wishes to regain possession of the same. Now, if the said L. Bucki & Son Lumber Company shall have the said property forthcoming, and shall abide the final order of the circuit court of the United States for the southern district of Florida, to which the said action has been removed, and wherein said action

is now pending, then this obligation shall be null and void, otherwise to remain in full force and virtue.

THE L. BUCKI & SON LUMBER COMPANY,
[SEAL.] By CHARLES L. BUCKI, *President.*
CHARLES LLOYD BUCKI. [L. S.]
FREDERICA BUCKI, [L. S.]
By CHAS. L. BUCKI, *Att'y-in-Fact.*
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
[SEAL.] Per E. M. M. WARFIELD, *President.*

Attest: H. E. BOSLER, *Secretary.*

Taken and approved November 4th, 1897.
[SEAL.] N. B. BROWARD, *Sheriff.*

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 30th day of Oct., A. D. 1897, before the subscriber,
72 a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and H. E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year above written.

FRED. S. AXTELL, [SEAL.]
Notary Public.

THE ATLANTIC LUMBER COMPANY, Plaintiff,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant.

Know all men by these presents, that we, L. Bucki & Son Lumber Company, a corporation organized under the laws of New Jersey, as principal, and Charles L. Bucki, Fredericka Bucki, John M. Des Rochers, Colin H. Robertson, Philip Walter and Roderick G. Ross, as sureties, are held and firmly bound under the Atlantic Lumber Company, a corporation organized under the laws of the State of Florida, in the sum of twenty thousand ($20,000) dollars, for the pay-

ment whereof well and truly to be made, the said L. Bucki & Son Lumber Company binds itself and its successors and said sureties bind themselves, and each of them and their and each of their executors and administrators.

Signed and sealed this 9th day of October, 1897.

The condition of the foregoing obligation is such that, whereas, the said The Atlantic Lumber Company on the — day of October, 1897, sued out a certain writ of attachment in a certain suit pending in said court, wherein the said The Atlantic Lumber Company was plaintiff, and the said L. Bucki & Son Lumber Company was defendant, which said writ was levied upon certain property of the said defendant, to wit: one million two hundred and fifty thousand feet of yellow-pine merchantable lumber as the property of defendant.

Now, if the said L. Bucki & Son Lumber Company shall have forthcoming the said property so levied upon, and shall abide
73 the final order of the court, then this obligation shall be null and void, otherwise to remain in full force and virtue.

L. BUCKI & SON LUMBER COMPANY.
[SEAL.] CHAS. LLOYD, BUCKI, *Pres't.*
C. W. SIMMONS, *Sec'y.*
CHAS. L. BUCKI. [SEAL.]
FREDERICA BUCKI,
By CHAS. L. BUCKI, *Att'y-in-Fact.* [SEAL.]
JOHN M. DES ROCHERS. [SEAL.]
COLIN H. ROBERTSON. [SEAL.]
PHILIP WALTER. [SEAL.]
RODERICK G. ROSS. [SEAL.]

Taken and approved Oct. 11th, 1897.

N. B. B-OWARD, *Sheriff.*

Know all men by these presents, that we, the L. Bucki & Son Lumber Company, Charles L. Bucki, Frederica Bucki, J. M. Des Rochers, Roderick G. Ross, Colin H. Robertson and Philip Walter, are held and firmly bound unto Napoleon B. Broward in the sum of twenty thousand dollars, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs and representatives respectively.

Signed and sealed this 9th day of October, 1897.

The condition of the foregoing obligation is such that, whereas, said Broward is sheriff of said county of Duval and State of Florida, and as such sheriff has received certain writs of attachment in the several suits now pending against the L. Bucki & Son Lumber Company, and as such sheriff has taken possession of certain lumber as the property of said company, and is about to relinquish such possession and turn over to certain vessel or vessels in the St. Johns river certain portions of said lumber.

Now, therefore, if the said lumber, or any part thereof is turned over to said vessel or vessels, and the said Broward is fully paid and indemnified for any and all loss he may suffer because of his relin-

quishing possession as aforesaid, then this obligation is to be void, else to remain in full force and virtue.

THE L. BUCKI & SON LUMBER COMPANY,
By CHAS. LLOYD BUCKI, *Pres.*
CHAS. L. BUCKI. [SEAL.]
FREDERICA BUCKI,
By CHAS. L. BUCKI, [SEAL.]
Att'y-in-Fact.
J. M. DES ROCHERS. [SEAL.]
RODERICK G. ROSS. [SEAL.]
COLIN H. ROBERTSON. [SEAL.]
PHILIP WALTER. [SEAL.]

74 Know all men by these presents, that we, the L. Bucki & Son Lumber Company, Charles L. Bucki, Frederica Bucki, J. M. Des Rochers, Roderick G. Ross, Colin H. Robertson and Philip Walter, are held and firmly bound unto Napoleon B. Broward in the sum of thirty-six hundred dollars, for the payment whereof well and truly to be made, we jointly and severally bind ourselves, our heirs and representatives respectively.

Signed and sealed this 9th day of October, A. D. 1897.

The condition of the foregoing obligation is such that, whereas, said Broward is sheriff of said county of Duval and State of Florida, and as such sheriff has received certain writs of attachment in the several suits now pending against the L. Bucki & Son Lumber Company, and as such sheriff has taken possession of certain lumber as the property of said company, and is about to relinquish such possession and turn over to certain vessel or vessels in the St. Johns river certain portions of said lumber.

Now, therefore, if the said lumber, or any part thereof is turned over to said vessel or vessels, and the said Broward is fully paid and indemnified for any and all loss he may suffer because of his relinquishing possession as aforesaid, then this obligation is to be void, else to remain in full force and virtue.

THE L. BUCKI & SON LUMBER COMPANY,
By CHAS. LLOYD BUCKI, *Pres.*
CHAS. L. BUCKI. [SEAL.]
FREDERICA BUCKI,
By CHAS. L. BUCKI, [SEAL.]
Att'y-in-Fact.
J. M. DES ROCHERS. [SEAL.]
RODERICK G. ROSS. [SEAL.]
COLIN H. ROBERTSON. [SEAL.]
PHILIP WALTER. [SEAL.]

Plaintiff then read in evidence a mortgage given by plaintiff to indemnify the defendant as surety upon one of the said forthcoming bonds, and a release of the said mortgage, which said mortgage and the said release were in the words and figures following to wit:

This indenture of mortgage, made and entered into on this 4th day of November, eighteen hundred and ninety-seven, by and between the L. Bucki & Son Lumber Company, a corporation organized under the laws of the State of New Jersey, party of the first part, and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the said State, party of the second part.

Witnesseth, that the said party of the first part, for and in consideration of the party of the second part becoming a surety
75 upon a bond to be given by the party of the first part for the forthcoming of property in a suit at law brought be (by) the Atlantic Lumber Company, a corporation organized under the laws of Florida, against the said party of the first part in the circuit court of Duval county, State of Florida, and removed from the court and now pending in the circuit court of the United States for the southern district of Florida, which said bond is to be in the penal sum of one hundred thousand dollars, conditioned to have the property which has been levied by a writ of attachment, issued in said action in the said State court before its removal to the Federal court forthcoming and abide the final order of the court, and in further consideration of the sum of one dollar in hand paid, has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant, sell, alien, remise, convey and confirm unto the said party of the second part, its successors and assigns, forever, all that certain lot, tract and parcel of land situate, lying and being in the city of Jacksonville, county of Duval, State of Florida, and described as follows, to wit:

All that certain lot, tract or parcel of land situate, lying and being on the west bank River St. Johns, about two miles east of the city of Jacksonville, in the county of Duval, and State of Florida, and known and described as follows, to wit: Beginning at a point indicated by a cedar post on the west bank of the St. Johns river, where a fence now stands, on the north side of the land owned by Advnigole S. Welch, running on a line with said fence westward until it intersects the east branch of Deer creek; thence by course of said creek to St. Johns river; thence along the river to a place of beginning, containing about ten (10) acres, more or less. Being the same lands that were conveyed to Sarah B. Hills by Charles A. Fairchilds by deed dated the twenty-fourth day of May, 1879, and recorded in the office of the clerk of the circuit court of the county of Duval, on the twenty-fourth day of May, A. D. 1897, in Book "E" sp. m. w. on page 430.

And all the saw-mills located on the said described lands, and all the booms, pens located in the said described lands, and all the engines, boilers, machinery, implements, articles and tools of every nature and kind attached to the said saw-mills and used in the operation of the said saw-mills, or any part thereof; and also all the planing mills, dry kilns, located on the said described lands, and all the engines, machinery, implements, articles and tools of every nature and kind attached to the said planing mills and dry kilns, or used in the operation of the same. And also all of the lumber and tim-

ber in the yards, attached to the said mill property of the
76 party of the first part, which may be manufactured from logs from time to time, and which may be remaining from time to time in the said yards, and also all the logs which may be hereafter remaining in the booms and boom pens aforesaid of the party of the first part. It being expressly understood by these presents that it is the intention of the said party of the first part to give a mortgage lien upon all of the mill plant, and every part thereof, of the party of the first part, located on the above-described lands and premises, and also upon all the said lumber and timber and logs that may, from time to time, be in and upon the said yards and boom pen and land and premises aforesaid.

It is also expressly understood that it is not the intention of this instrument to prevent the party of the first part from operating the said saw-mills and planing mills and dry kilns in the manufacture of and preparation of lumber and timber for market, nor to prevent party of the first part from selling, disposing of and shipping said lumber and timber in the ordinary course of the business of the said party of the first part as a manufacturer and seller of lumber and timber, but an accurate — of said lumber, timber and logs shall be kept by the party of the first part, and the proceeds thereof, from time to time, less the actual operating expenses of said mill, shall be subject to the lien of this mortgage, or invested in logs to take the place of those sawn, which shall become encumbered by this lien.

And this indenture of mortgage is made upon the following express conditions and provisions, to wit: That this instrument is made and executed for the express purpose of securing the said party of the second part, and indemnifying the said party of the second part against the payment of any moneys, costs, expenses or damages it, the said party of the second part, may have to pay or incur in consequence of and by reason of its obligations and liabilities as surety upon the bond above described and mentioned. And in the event that the said party of the first part shall pay, discharge and satisfy all moneys, claims and demands that can or may be made upon it, or upon the said party of the second part, by reason of or in consequence of any obligations or liabilities made or created or incurred against either of the said parties, by reason of and in consequence of the execution and delivery of the said bond by the parties named as obligors therein, then in that event, this obligation is to be null and void; otherwise to remain in full force and effect. Or, in event that the said bond shall be cancelled and discharged by order of the said courts, or either of them, or of any other court, then this indenture of mortgage shall become null and void; otherwise to remain in full force and effect.

77 And the said party of the first part, for itself, successors and assigns, the above-described and hereby-granted premises, and every part and parcel thereof, with the appurtenances, unto said party of the second part its successors and assigns, against the said parties of the first part, its successors and assigns, and against all and every person or persons whomsoever, lawfully claiming, or

to claim, the same, shall and will warrant, and by these presents forever defend.

It is further stipulated and agreed that this indenture of mortgage is executed by the party of the first part, by virtue of and under the authority of a resolution of the stockholders of the said L. Bucki & Son Lumber Company, passed and adopted at an annual meeting of the said stockholders in an office of the said company, at the corner of Greene and Grand streets, in the city of Jersey City, New Jersey, on the twentieth day of October, 1897, a copy of which said resolution, under the seal of the said party of the first part, is hereby attached and marked "Schedule A," and made a part of this indenture of mortgage.

In witness whereof, the said party of the first part has signed its name by its president, and caused the seal of said party of the first part to be attached hereto, duly attested.

L. BUCKI & SON LUMBER CO.,
By CHAS. LLOYD BUCKI, *Pres.* [SEAL.]

Signed, sealed and delivered in the presence of us as witnesses:

J. M. DES ROCHERS,
W. C. COX.

STATE OF FLORIDA, }
County of Duval. }

I, Maurice H. Slager, a notary public in and for said State and county, do hereby certify, unto all whom it may concern, that Charles L. Bucki, to me well known as president of the first party of the foregoing instrument, and that the name of the party of the first part was signed to said instrument by him, the said Charles L. Bucki, and the seal of the said party of the first part was duly attached to the said instrument in his presence, the execution of said mortgage in the manner aforesaid having been duly authorized.

Wherefore, it is prayed that the said indenture of mortgage may be recorded.

[SEAL.] MAURICE H. SLAGER,
Notary Public.

Nov. 4th, 1897.

STATE OF FLORIDA, }
County of Duval. }

Be it remembered, that on this 4th day of November,
78 A. D. 1897, I, clerk of the circuit court in and for the said county, have duly recorded the foregoing instrument in the public records of said county.

In witness hereof, I have hereunto set my hand and seal of said court, this day and year above written.

[SEAL.] P. D. CASSIDEY, *Clerk*,
By H. J. CASSIDEY, *D. C.*

The release, made this 5th day of June, in the year 1899, by the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland;

Whereas, by mortgage bearing date on the 4th day of November, 1897, the L. Bucki & Son Lumber Company, a corporation organized under the laws of the State of New Jersey, did grant and convey unto the Fidelity and Deposit Company of Maryland, its successors and assigns, by way of mortgage, the land and property in said mortgage described, for the purpose of securing said Fidelity and Deposit Company of Maryland as surety upon a bond given for the forthcoming of property in a suit at law, instituted by the Atlantic Lumber Company against the L. Bucki & Son Lumber Company in the circuit court of Duval county, State of Florida, and removed from that court into the United States circuit court for the southern district of Florida, said bond being in the penalty of one hundred thousand dollars, as by reference to said mortgage recorded in the public records of Duval county, Florida, Book 60, page 197, will more fully appear.

And whereas, said suit at law has resulted in favor of the L. Bucki & Son Lumber Company, and there is no further liability on the said forthcoming bond executed by the said Fidelity and Deposit Company of Maryland, wherefore this instrument is executed.

Now, therefore, this release witnesseth, that in consideration of the premises and the sum of one dollar in hand, the said Fidelity & Deposit Company of Maryland does hereby grant and release unto the said L. Bucki & Son Lumber Company all of that lot of land, premises and property mentioned and described in said mortgage, to have and to hold the same unto the said L. Bucki & Son Lumber Company, its successors and assigns, in the same manner as if the said mortgage had never been executed.

In witness whereof, the said Fidelity and Deposit Company of Maryland has caused this release to be signed by its president
79 and its secretary, and its corporate seal attached the day and year first above written.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[SEAL.] E. M. M. WARFIELD, *President.*

Attest: H. E. BOSLER, *Secretary.*

STATE OF MARYLAND, *City of Baltimore,* } ss:

On this 5th day of June, A. D. 1899, before me, the subscriber, a notary public of the State of Maryland in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and H. E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledge the execution of the same, and being by me duly sworn, severally and each for himself, deposeth

and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the proceedings (preceding) instrument is the corporate seal of the company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

FRED S. AXTELL, [SEAL.]
Notary Public.

And thereupon Charles L. Bucki, the president of the plaintiff, testified that it was necessary to give said mortgage in order to obtain the said surety company as a surety upon the said bond, and that he paid the said surety company seven hundred and fifty dollars in addition to the giving of the said mortgage to obtain the said surety upon the said bond.

And to further maintain the issues on its part, the plaintiff adduced evidence of its officers and agents establishing that its mill plant levied upon by the said writs of attachment, located upon the land mentioned in the writs, consisted of a two-deck saw-mill with machinery for operating two circular saws; five planing mills, two dry kilns, docks and wharves extending from the said mills into the St. Johns river; sheds and outbuildings, an elevated reservoir with a capacity of six thousand gallons of water and connected with water pipes and hydrants and hose for extinguishing fires; also a boom with a capacity of six million feet of logs, board measure, made at the mouth of a creek by piling to keep the logs from floating into the St. Johns river; with (which) evidence was not disputed by the defendant.

80 Plaintiff also adduced evidence established that it had been operating its said mills and had been carrying on the business of manufacturing and selling yellow-pine timber and lumber for the period of four years and a half next prior to the levy of the said writs of attachment; that the average annual output of the said mills and business was between twenty-eight and thirty-two million feet for the said period, and that the monthly output of the said mills and business during such period of time was about two and one-half million feet of timber and lumber, of which about two-thirds was timber and one-third first and second class boards. Plaintiff also adduced evidence establishing that on the first day of October, A. D. 1897, its said mills were running at about their full capacity.

To further maintain the issue on its part, the plaintiff, over the repeated objections of the defendant, which were overruled, put in evidence its books and the testimony of the officers of the plaintiff, tending to establish that for the period of nine or twelve months next preceding the first day of October aforesaid, the net value of the use of its said mills and of its said business, or the net profits of its said business was a considerable sum of money, to wit: five

thousand dollars per month on an average for the said period; and that much the greater part of the product of the said mills was sold in northern markets, to wit: Baltimore, New York and Boston.

The plaintiff also adduced evidence establishing that on October 1st, aforesaid, it had orders and contracts on hand for a large quantity of timber and lumber which had not been sawn, and that it had in its boom at said mills, three million feet board measure of logs, ready to be manufactured.

Plaintiff also adduced testimony tending to prove that at the time the said attachments were levied the prices of yellow-pine timber had commenced to improve and that a part of the year of 1898, such prices were higher than in 1897, and that during the year 1899, such prices were higher than during the year 1898.

Plaintiff also adduced evidence that the par value of its capital stock was two hundred and fifty thousand dollars; that the plaintiff's president, Charles L. Bucki, and his mother, Frederica Bucki, owned more than four-fifths of said stock; that for several years prior to the organization of the plaintiff company, which was in the fall 1892, the said Charles L. Bucki and Frederica Bucki were manufacturing yellow-pine timber and lumber at Ellaville, Madison county, Florida, ninety miles west of Jacksonville, under the firm name of L. Bucki & Son, and that the said Charles L. Bucki and J. G. Heagey, its mill superintendent, had had extensive ex-
81 perience in logging, that is, in cutting the standing trees and delivering them into saw-mill boom pens, both by mule and team, water aud railroad, including the construction of temporary railroads, connecting with main or chartered lines of railroads or water, and were familiar with the costs of the construction of such temporary roads; the rolling stock used thereon, and the cost of camp equipment, and of cutting and delivering such logs into the boom pens. And the plaintiff also adduced evidence tending to establish that the said L. Bucki & Son on the first day of October, 1897, aforesaid, owned about thirty-three miles of railroad iron weighing from thirty to thirty-five pounds per yard, about fifty-two car trucks, constructed to transport logs on, and three railroad locomotives, all of which were at said Ellaville, Florida, and evidence tending to establish that such trucks and engines, with repairs, and said iron rails would have been soon after October 1st, aforesaid, available for logging purposes as aforesaid, and obtainable by the plaintiff.

And there was also testimony tending to establish that said cars were in very bad condition; that they could not be repaired profitably, so as to be fit for use, and that the engines also were in a bad condition.

The plaintiff also adduces evidence tending to establish that for two years and upwards after October 1st, 1897, there was timber available and obtainable to supply its said mills with logs; that one tract of land known as the Frank Russel tract, containing about thirteen million feet of merchantable standing timber and upwards, located about ten miles west from plaintiff's said mills, and but a short distance from the Florida Central & Peninsular railroad and

but a short distance from water communication with said mill, could have been purchased in October, A. D. 1897, for the sum of from twelve to fifteen thousand dollars; that another tract of land located near Starke, in Bradford county, Florida, containing about 11,600 acres, known as the Payne-Cochrane tract, could have been purchased in October aforesaid for the sum of five dollars per acre, and which land was represented to contain five thousand feet per acre, and that the said The Atlantic Lumber Company were logging from said tract at the time of said trial, and had been for some time prior thereto.

That another tract of land located near Paradise, in —— county, Fla., through which a railroad ran, was in the market for sale in October, A. D. 1897; that it contained about thirteen thousand acres, and was offered at three dollars per acre and contained about two thousand feet to the acre of merchantable timber; and there were other tracts containing timber in large quantities,
82 located on or near the St. Johns river and Orange creek, which were available to the Jacksonville market. And there was testimony tending to establish that a great part of Florida east of the Suwanee river and for a distance of one hundred miles south of Jacksonville contained yellow-pine timber.

And to further maintain the issue on the part of the plaintiff, it examined HENRY CLARK, a witness, who testified that he was owner of a saw-mill in Jacksonville, with a capacity of about 4,000 per day, and had been engaged in manufacturing yellow-pine lumber in Jacksonville for over twenty-five years; that in the year 1897 he obtained a considerable portion of logs for his mill by buying logs on the St. Johns river; that the prices of lumber were some higher in 1898 than in 1897, and considerably higher in 1899 than in 1898.

Evidence was adduced tending to prove that the plaintiff never refused to pay for logs delivered prior to October 1st, 1897, and that at about twelve o'clock noon of that day, The Atlantic Lumber Company requested at plaintiff's office in New York, the sum of twenty-five hundred dollars on account of logs delivered, and that the plaintiff declined to pay that or any sum on that day, and there was evidence tending to prove that C. Bucki, president of the plaintiff company, stated to J. D. Bucki that the company did not owe the defendant company anything that day, but that no such denial was made to any officers of the defendant company.

ARTHUR MEIGS, a witness on the behalf of the defendant, testified that he was the general manager of the Atlantic Lumber Company on October 1st, 1897, and for a long time prior to that, and that prior to June, 1897, the Atlantic Lumber Company had been accepting the negotiable paper of the plaintiff for logs sold, and that the National Bank of Jacksonville, Florida, had been accustomed to discount the said paper, but that subsequent to that month the paper of the plaintiff went to protest at frequent intervals, and finally in August, 1897, upon the protesting of the draft for $5,340.00, dated August 16th, 1897, the National Bank of Jacksonville, Florida,

refused to discount any more of the paper of the plaintiff and that it made it necessary for the Atlantic Lumber Company to demand cash from the plaintiff in settlement of logs; that the plaintiff failed to meet its log payments on the 1st of September, 1897, and between that day and the 15th of September, 1897, the plaintiff was in default of its payments for logs to the amount of about $16,000.00, including the draft for $5,340.00; that he was in New York a large
83 part of the month of September 1897, and that he and the president of the company were making repeated demands upon the plaintiff for the payment of money due for logs, including the draft for $5,340.00 held by the National Bank of Jacksonville, and that plaintiff at no time prior to the institution of the attachment suit disputed their liability to pay for the logs, according to the contract price, and made repeated promises to the defendant to pay them the amount due for logs.

That on October 1st, 1897, he and Mr. Ambler called upon Mr. Charles L. Bucki, president of the company, and requested payment of the amount due them, and informed the said L. Bucki that they would accept $2,500.00 on that day and wait a while for the payment of the residue, and that the said Bucki told them that they were unable to pay them $2,500.00 on that day unless Mr. J. D. Bucki, a stockholder of the company who was then and there present, and who was reputed to be a man of means, would lend that amount for the plaintiff, and that the said J. D. Bucki refused in his presence to lend the plaintiff $2,500.00 and that no complaint of any kind was made in regard to the logs, nor was any objection made to paying the amount due beyond the fact of plaintiff's being unable to pay.

That the $2,000 advanced included in the draft for $5,340.00 was made in consequence of the Atlantic Lumber Company having an unsettled claim against the plaintiff on another account than for logs, which amounted to about $1,800, and that this advance had been made at intervals by the plaintiff to the Atlantic Lumber Company for several years, and that he was aware of several efforts which had been made by H. W. Simmons in September, 1897, to raise money from New York banks for the plaintiff, which had failed.

And the said Meigs testified that he had had practical experience of about eight years in the logging business, and that it would have required an investment of from fifty to seventy-five thousand dollars for a logging plant, trucks, locomotive, rails, mules, carts, etc., in order to have enabled the plaintiff to prepare for getting out logs to the amount of 2,000,000 feet per month.

D. G. AMBLER, a witness in behalf of the plaintiff, testified that he was president of the Atlantic Lumber Company on October 1st, 1897, and had been such since its organization, and that he was frequently in New York during the summer of 1897, and made fre-
84 quent calls at the plaintiff's office for the purpose of securing payment of money due the Atlantic Lumber Company for logs furnished under contract, and that he on several occasions assisted Mr. H. W. Simmons to raise money for the plaintiff, and in September, 1897, after the plaintiff had failed to raise money at

its own banks, he endeavored to raise money upon the plaintiff's paper at his own bank, in that city upon the First National Bank of Tampa stock as collateral security, and that he had never theretofore had difficulty in borrowing money from his Bank of Tampa upon this collateral. But that they refused to lend money upon the plaintiff's note secured by this collateral. That at no time on or prior to October 1st, 1897, had the plaintiff disputed its liability to pay the full contract price to the Atlantic Lumber Company for logs delivered, and that during the latter part of the month of September, repeated requests were made upon plaintiff to pay the amount due, and they always promised to pay as soon as funds could be obtained. That on October 1st, 1897, he went in company with Mr. Meigs to the office of the plaintiff in New York city to obtain payment for the amount due for logs and that Mr. Meigs in his presence represented to Charles L. Bucki, the president of the plaintiff that if the sum of $2,500 was paid them on that day they would wait for a while for the remainder of the amount then due for logs, but that the said Bucki stated that they were unable to pay this amount unless Mr. J. D. Bucki, who was present, and who was a stockholder would lend that amount to the plaintiff, the said J. D. Bucki expressed his willingness to do so if C. L. Bucki, the president of said company, said so, but this, C. L. Bucki refused to do and that no objection was made to paying the amount due for logs on that day beyond the fact of the defendant's inability to pay.

During the trial of this action, defendant's counsel announced that the Atlantic Lumber Company would have to pay whatever judgment was recovered against the defendant and the evidence established that Daniel G. Ambler was the president of the Atlantic Lumber Company on October 1st, 1897, and that Arthur Meigs was then and still is the general manager of said company, and Richard H. Liggett, the counsel who made said announcement was then and still is the secretary of the said company, and that the said Meigs and Liggett were at the time of the trial, directors of said company.

And there was evidence tending to establish that on October 1st, 1897, there was pending negotiation for a contract between plaintiff company *one* Sheppard, Morse & Co., of Boston, Mass.; that said
85 contract had been signed by plaintiff and delivered to said Sheppard, Morse & Co., and the promissory notes of plaintiff had been delivered to said company to the amount of $25,000 on or before October 1st, 1897; that by the terms of the said contract, *the* Sheppard, Morse & Co., were to loan plaintiff $25,000 and take plaintiff's first-class boards then in plaintiff's yards at Jacksonville in payment for such loans, the price of such boards to be credited on the said loan as fast as they were received by said Sheppard, Morse & Co.; Sheppard, Morse & Co. to have a lien on plaintiff's mill properties and said boards until said loan was paid; that said boards had been marked with the initials of said company; and that $15,000 of such loan had been promised to be sent to New York city to plaintiff not later than the 2nd day of October, in said year. And there was further evidence tending to show that said S. M. & Co., had notice of a logger's lien in behalf of the Atlantic Lumber

Co., upon the logs and lumber contracted for which they insisted upon being released before completing the contract; but that the president of the A. L. Co., was never informed of the objection of the execution of the contract nor was he requested to release such lien and there was evidence tending to prove that the said writs of attachment prevented the completion of said negotiation and said loan and the performance of said contract.

And the evidence was adduced and not disputed that soon after such attachments were issued, the said contract and notes were cancelled and that no lumber was delivered under it.

And the testimony tended to prove that if the said contract for the said loan had been consummated and carried out, Sheppard, Morse & Co., would have purchased of plaintiff by the terms of the said contract 1,000,000 feet of boards thereafter to be manufactured (not including the boards to be delivered to pay such loan) with the right at the option of the said company to take 2,000,000 feet more of boards at the then existing market price.

The plaintiff adduced evidence establishing that the National Bank of Jacksonville after these attachments were levied received and discounted two negotiable obligations of the plaintiff to the amount of eleven hundred dollars, at the request of E. Schwarb, drawee of said drafts, that the said obligations were not paid, and were part of the amount for which the bank levied an attachment 28th December, 1897, and were afterwards paid May, 1898.

And the evidence established that the Atlantic Lumber Company was considerably indebted to the said bank on October 1st, 1897, for some time previous thereto and subsequent thereto.

Evidence was adduced by the defendant that Ernest Schwaab, in the latter part of 1898, recovered a judgment for about $2,000
86 against plaintiff on an indebtedness contracted after these attachments were levied: and that an execution issued on said judgment, the saw-mill plant of the plaintiff was sold and purchased by the said Henry Weiler, and that the amount bid by the said Weiler was about the sum due on the said execution.

The defendant produced as a witness JOHN N. C. STOCKTON, who testified that on or about February 22nd, he leased the plaintiff's mill for the period of one year from that day, at a rental of one thousand dollars per month, and that he paid the rent to said Henry Weiler, on account of the indebtedness of the plaintiff to the said Weiler; that he operated the mill but a small portion of the year, and sawed only about six million feet of lumber during the year; that he made no profit by operating said mill, and that Charles L. Bucki, loaned, or advanced to him about ten thousand dollars of security to be used in carrying on the said saw-mill business. That said Stockton testified that he felt confident that such lease was executed by the plaintiff company, but that after search for it, he had been unable to find such lease.

The said CHARLES L. BUCKI in behalf of plaintiff testified that he individually entered into a written contract with the said Stockton,

whereby the said Stockton was to operate the said mill plant, and produced said written contract and testified that his and the said Stockton's signatures were their genuine signatures to such contract, and the plaintiff then offered in evidence the said written contract which is in the words and figures following, to wit:

Copy.

Whereas, the L. Bucki & Son Lumber Company, a corporation organized under the laws of the State of New Jersey, is at present, by reason of attachment suits brought against it, claiming damages in large amounts, financially embarrassed, and unable successfully to carry on its business; and,

Whereas, Charles L. Bucki owns and controls about two thousand one hundred and fifty (2,150) shares, out of a total of two thousand five hundred (2,500) shares of the capital stock of the L. Bucki & Son Lumber Company, and is therefore vitally interested in the financial success of said company; and,

Whereas, Charles L. Bucki deems it necessary to the protection of his personal interests in the L. Bucki & Son Lumber Company that the services of John N. C. Stockton shall be secured to him and to the L. Bucki & Son Lumber Co. for a period of five years; and,

87 Whereas, John N. C. Stockton has agreed to give his services to the said Charles L. Bucki and to the said L. Bucki & Son Lumber Company in the clearing away of the financial difficulties of said company, and in the successful operation and management of their business affairs in Florida;

Now, therefore, this agreement entered into this 22nd day of February, A. D. 1898, by and between Charles L. Bucki of the first part, and hereinafter designated as Bucki, and John N. C. Stockton of the second part, hereinafter designated as Stockton, both of Jacksonville, Florida, witnesseth:

1st. That Stockton agrees that he will give his services, time and attention to the business affairs of Bucki and of the L. Bucki & Son Lumber Company from the — day of ——, A. D. 1898, for the full term and period of five years thereafter for the consideration and upon the terms and conditions herein stated; it being understood and agreed that he, Stockton, shall have the right to retain, if he so desires, his position as president of the National Bank of the State of Florida, and give to that position such of his time and services as may be necessary, provided such duties do not conflict with his duties under this contract.

2nd. That Bucki has contracted for and agrees to accept the services of the said Stockton for the said period of five years at the agreed consideration and upon the terms and conditions herein stated, and to pay or to cause to be paid to Stockton, as compensation for his services, the sum of five thousand ($5,000) dollars per annum, payable in equal monthly instalments at the end of each month, as a guaranteed fixed salary, and in addition thereto, as a contingent compensation such other and further sums as shall equal one-fourth of the net profits of the business done, after allowing to

Bucki out of the total net profits an annual salary of five thousand ($5,000) dollars.

3rd. That Bucki agrees to secure from the L. Bucki & Son Lumber Company, a lease of that company's mill property in the city of Jacksonville, Florida, to Stockton, for the period of one year at the annual rental of twelve thousand ($12,000.) dollars per annum, and to purchase and procure from said company a conveyance to Stockton of all the logs belonging to the company now in the log boom of the company's mills, the logs to be paid for at their fair market price, the said Stockton to pay for said logs with interest on the price of said logs, out of the profits made by him under the lease herein provided for as soon as he conveniently can without embarrassment to his business; and the said Bucki further agrees to provide the said Stockton with certain bills receivable (more
88 particularly described hereinafter), and with the sum of six thousand ($6,000) dollars at the time and upon the terms and conditions and for the purposes set forth in paragraph 11 of this agreement.

4th. That all other available assets of the L. Bucki & Son Lumber Company, including all bonds that have been or may be issued by the company, and secured by mortgages on the mill property and real estate, shall be used in the payment of the indebtedness of the company, so as to facilitate the quickest possible clearing off of the indebtedness of the L. Bucki & Son Lumber Company.

5th. That Stockton shall be given and shall take charge of the financial affairs of the L. Bucki & Son Lumber Company with a view to the clearing away as fast as possible of the financial embarrassments now surrounding the company.

6th. That for the period of one year the lumber business as heretofore conducted by the L. Bucki & Son Lumber Company shall be carried on by Stockton in his name, but for the benefit of Stockton and Bucki, the gross receipts from the business to be applied, first, to the payment of the operating expenses, and the remainder, if any there be, towards the payment of Stockton at the fixed salary of five thousand dollars per annum, and the remainder thereafter, if there be any, to be paid on account of the rent of the mill; and the remainder thereafter, if any there be, after the payment to Charles L. Bucki of a salary of five thousand dollars per annum, shall be divided between Stockton and Bucki in the proportion of one-fourth to Stockton and three-fourths to Bucki, provided orders can be obtained at remunerative prices.

7th. That Stockton agrees to use one-half of his share of the profits (his contingent compensation), in the purchase of shares of the capital stock of the L. Bucki & Son Lumber Company now owned by persons other than Charles L. Bucki and of Charles L. Bucki until he owns one-quarter of the whole capital stock of the company, provided such stock can be purchased by him at its reasonable cash value.

8th. That Bucki agrees that at the end of one year from date he will procure the entering into of a contract by the L. Bucki and Son Lumber Company, with Stockton, for the employment of Stockton

as secretary and treasurer, and as Florida manager of its affairs for the unexpired remainder of the five years covered by this contract, at the compensation herein provided, five thousand dollars fixed guaranteed salary, and a contingent compensation equal to one-fourth of the net profits of the company, all dividends paid on stock belonging to Stockton to be considered part of such profits—the profits to be determined after deducting from the total profits
89 the fixed salaries of five thousand dollars to be paid to Stockton and Bucki each; and Stockton agrees that he will thereupon enter into a contract with the L. Bucki & Son Lumber Company for his services for the above-mentioned compensation, and that he will close up the business operated by him under the lease heretofore mentioned, and after paying off all the liabilities so far as the assets will go, he will distribute any net profits remaining under the said lease as hereinbefore set forth.

9th. That Bucki hereby guarantees Stockton against personal loss while operating the business in his, Stockton's, name, reserving the right at any time that the business may not be profitable, to require the closing out of the business on reasonable notice, and after a full and complete release shall have been given to Stockton by the L. Bucki & Son Lumber Company from all the rent to accrue under the aforesaid lease.

10th. That it is mutually understood and agreed that the payment to Stockton by any firm or corporation engaged in the lumber business in which Bucki is interested, of the salary or other compensation hereinbefore specified, or any part of such salary or compensation, shall, for the purpose of this contract, be held and considered as a compliance to that extent with the provisions of, and as a payment under, this contract of the monies to be paid Stockton.

11th. That Bucki assigns and transfers to Stockton the right to collect through J. D. Bucki from Sabel Brothers $6,000.00 approximately, the exact amount being unknown, to become due him from the sale of certain steel and iron railroad rails owned by Bucki situate in Suwannee county, Florida, and also the following-described bills receivable, to wit:

Kelly, Hough & Co., due Jan'y 12th, 1899	$1548.00
Kelly, Hough & Co., due Jan'y 12th, 1900	1548.00
D. L. Byrd, due January 20th, 1899	125.00
D. L. Byrd, due January 20th, 1900	125.00
Beasley & Millinor, due November 1st, 1898	1000.00
Beasley & Millinor, due November 1st, 1899	1000.00

with the privilege to retain, sell, transfer or hypothecate any or all of said sums and bills, and to use the proceeds of the same as a working capital in said business, and also to protect him, Stockton, against loss on account of operating expenses, and rent of said mill, and failure of said business to pay him, Stockton, the salary guaranteed him by Bucki, and to make good the guarantee of Bucki contained in paragraph 9 of this agreement—provided, however, that if
90 Stockton collects the said sum of $6,000.00 and receives the above-mentioned bills receivable that on demand of Bucki

within three months from date he will repay to Bucki three thousand dollars of said money. And further, that all sums so collected by Stockton, or obtained by sale or hypothecation of said bills receivable, shall be repaid to Bucki with eight per cent. interest out of the profits of said business, if there be any, under the lease (the operating expenses, rent and Stockton's salary having been paid); or if said bills or any of them have not been sold or hypothecated or collected, that the same shall be returned. It being understood and hereby expressly stipulated that if Stockton shall not have made out of said business sufficient to pay all operating expenses, all charges for rent and his salary, then he shall not be required to repay said money or to return said bills, but may retain the whole or such part thereof as may be necessary to pay all operating expenses, rent or salary remaining due, and for which Stockton may become liable.

In witness whereof, the parties hereto have executed this contract in duplicate, this the 18th day of March, A. D. 1898.

(Signed) CHARLES LLOYD BUCKI.
JOHN N. C. STOCKTON.

Witnesses:
J. M. DESROCHERS.
G. D. GAY.

And the court excluded the said contract as being immaterial to any issue in this suit, and refused to allow the same to be read to the jury after defendant withdrew all objections to its being read in evidence, to which refusal of the court to permit the said contract to be read in evidence, the plaintiff then and there and before the jury retired, excepted on the ground that it was the best evidence of the true relations between the said plaintiff, said Bucki and the said Stockton, in reference to the operating of the said mill plant in 1898, and of the amount of rent agreed to be paid and tended to support the testimony of the said Bucki; that no lease was executed. The said Bucki further testified that he had no recollection that any lease was executed to said Stockton by the plaintiff, and was unable to find any such lease, and that he put all the capital in the business of operating said mill plant during the said year, that the said mill plant under the said Stockton's management was operated at a great loss; and that the money and funds which were paid by Stockton to the said Weiler on account of such rent was his, Bucki's money, and that to the extent such payments to Weiler reduced the debt
91 of plaintiff to him, to the same extent it increased the debt of plaintiff to him, Bucki. The said Bucki further testified that he was in the city of Washington most of the time between February 22nd, 1898, and February 22nd, 1899.

The defendant took the deposition of ALFRED J. ROTHERO, in New York, to be used in this case, and said Rothero testified that he was in the employ of and book-keeper for the Degnon-McLean Construction Company; and the plaintiff read in evidence so much of said deposition as — in the words and figures following, to wit

Q. Have you in your possession as book-keeper of the Degnon-McLean Construction Company a copy of the statement of the bill rendered by your company to the L. Bucki & Son Lumber Company, on account of the loss sustained by it through the failure of the L. Bucki & Son Lumber Company to perform its contract with the Degnon-McLean Construction Company?

A. Yes, sir.

Q. Have you personal knowledge of that account being made up and rendered to the L. Bucki & Son Lumber Company?

A. I made it up.

Counsel for defendant produces said statement before the notary and offers the same in evidence, and a true copy thereof is incorporated in the testimony, subject to objections:

Messers. L. Bucki & Son Lumber Company, 11 Broadway, New York city.

Nov.	3.	To excess price on 3,540 feet yellow pine, at $7.50	$26.55
"	6.	" excess price on 3,283 feet yellow pine, at $7.50	24.62
"	5.	" excess price on 19,376 feet yellow pine, at $7.50	145.32
"	11.	" excess price on 14,034 feet yellow pine, at $7.50	135.25
"	9.	" excess price on 9,036 feet yellow pine, at $7.50	67.78
Dec.	16.	" excess price on 256,578 yellow pine, $6.50	1,667.75
		" labor on account of defective dressing, 1,984,100 at $1	1,984.10
		" allowance for account waste on material bought from stock	500.00
			$4,521.37

92 Q. Will you please state whether your company has ever rendered and made claim against the L. Bucki & Son Lumber Company for any other allowance than those specified in that statement?

A. No, sir; we have not.

Q. As I understand it, the dates specified in that statement offset the various amounts, and represent the dates upon which such excess prices were paid?

A. No, not entirely, sir. The statement that you would take from the ledger here, of the account with L. Bucki & Son Lumber Company, would be more authentic than that, because each one of those items is the summary of two or three of these.

Q. Can you produce the account?

A. Yes, sir.

Witness produced the account.

Counsel for defendant offers the ledger account produced by the witness in evidence, and the witness here gives a detailed statement of the amount of each of the said items of excess prices, and the dates when the said amounts were expended. The witness explains that the dates upon which such charges were made are the dates when the Degnon-McLean Construction Company were obliged to purchase lumber from other sources to fill out the orders which Bucki had failed to ship:

Nov. 3, $26.55; Nov. 6, $24.62; Nov. 5, $145.32; Nov. 11, $105.25; Nov. 9, $67.78; Dec. 21, $324.64; Dec. 29, $156.15; Jan. 13, 1898, $315.49; Jan. 17, $857.75; Jan. 25, $695.45; Jan. 31, $42.26; Feb. 18, $82.40; Feb. 24, $131.36.

Q. Did you make the entries?

A. Yes, I made all the entries.

Q. And you know that that bill produced here was the one that was rendered by your company to the L. Bucki & Son Lumber Co., do you?

A. Yes, sir.

Q. There is an item there of $1984.10. Do you know what that was for?

A. On account of the timber not being fit for the use that it was required for, and fit for what they were paying for. It was not dressed properly.

Q. How was that incurred, that disbursement?

A. By labor, sir.

Q. Labor performed on it to make it fit for the purpose for which it was ordered?

A. Yes, dressing.

Q. There is an item on here of $500 allowance for account
93 of waste on material bought from stock. That is an estimate, I understand, of what it would be?

A. Yes, sir.

Q. The statement last given from your ledger represents the actual amount of money which you paid out on these various accounts, does it not?

(A.) Yes, on Mr. Bucki's account.

Q. You don't know that the Degnon-McLean Construction Company really sustained a loss of $500, do you, or not?

A. No, the charge was given to me, sir, by the chief engineer, Mr. Bucki's representative being present when this bill was made out.

Q. Do you or not know of your own personal knowledge whether these various items of excess charges represent the least amount for which you might have purchased the lumber needed on those various dates to make up deficiencies in deliveries made you by the Bucki Company?

A. No, sir; I didn't send out for prices or order the material.

Q. Has any part of the account offered in evidence and rendered by you to the Bucki Company been paid by them?

A. By account contra it has.

Q. That is to say, you have retained part of it out of the money which you owed them for lumber delivered?

A. Yes, sir.

A. (Q.) Were these purchased on account of which excess charges were made necessary on account of the failure to deliver lumber or because the lumber delivered was of so defective a character that it was not fit for use? Have you any personal knowledge that will enable you to answer either one way or the other?

A. It was on account of the failure to deliver the material.

Q. In that answer you don't of course include this $1984.00 which is for dressing lumber?

A No, that could hardly be termed an excess charge. That $1900 odd was on account of defective dressing for material that was actually delivered.

Q. And when was that delivered? Do you know?

A. At various dates, you know—different times.

And the said testimony of the said witness was read in evidence for the purpose of proving and as tending to prove the item of charges made by the Degnon McLean Company against the plaintiff on account of the non-delivery of lumber according to the terms of its contract.

And thereupon the court on motion of the defendant ex-
94 cluded such testimony from the jury, and decided it was not admissible, on the ground that the said witness did not know of his own personal knowledge that charges and items of charges appearing in said testimony, made by the said company against the plaintiff on account of lumber and timber to make up dificiencies in the orders for timber and lumber taken by the plaintiff prior to October 1st, 1897, were correct and true, and that it was not the best evidence to prove such facts to which decision of the court excluding testimony, the plaintiff then and there and before the jury retired, excepted on the ground that such testimony was legally admissible to prove that such charges and items of charges were made against the plaintiff, and which tended to prove, with or without other testimony, that such charges were just and correct. And on the ground the entries in the books of a business concern having been proven to have been regularly kept and the entries made in the usual course of business by the book-keeper who kept such books and made such entries are admissible in evidence although such book-keeper has no personal knowledge of the original transaction conducted and made by other employés were well founded in fact.

And D. U. FLETCHER, Esq., testified that he was the local counsel for the defendant, and a local director of defendant.

And defendant on its part examined THOMAS V. CASHEN, who testified that he was the owner of a saw-mill in Jacksonville aforesaid of a capacity of ten to eleven million feet board measure per annum; that in the year 1898, he supplied his mill with logs by pur-

chasing rafts of logs that were b-ought down the St. Johns river and by logging from his own lands near the St. Johns river; and that estimating his stumpage on his own lands at one dollar per thousand, his logs cost him delivered in his boom at his mill $5.80 per thousand feet, and that he was still operating his mill.

Defendant also examined as a witness in its behalf one M. D. BARBER, who testified that he was a logger, and that on an investment of sixty-five hundred dollars, by using a tram road with a hewn track eight and a half miles long, cutting one and a quarter miles on each side of the track, he was able to get out ten thousand feet per day of merchantable timber from lands that had been cut over twenty years before. And he further testified that to put in an average of 2,000,000 ft. a month would require about 12 outfits such as his, and in addition thereto mules and carts, and that he
95 estimated that it would cost about $75,000 to prepare to get out 2,000,000 a month by the use of poll roads.

Plaintiff also examined as a witness HENRY CLARK, who testified that he had been engaged in manufacturing at his own mill in Jacksonville, aforesaid, yellow-pine timber and lumber for thirty years and upwards; that the capacity of his mill was about forty thousand feet per day, and that he had obtained his supply of logs chiefly from loggers who brought them in rafts down the St. Johns river. It was also established that in 1897, and ever since then, pine logs were sold in Jacksonville market in the absence of special contract on a basis of $7.00 per thousand feet board measure, for those averaging three to the 1000 feet, and that such market price increased or decreased $1.00 per unit as the logs increased or decreased from three logs per thousand feet.

Defendant also examined as a witness ARTHOR MEIGS, the general manager of the Atlantic Lumber Company, who testified that said company had been engaged in logging some years prior to and since the first day of October, 1897, except for a short time in said month, and that said company delivered to purchasers at or near said Jacksonville, on an average about two million feet per month of merchantable pine timber; and for some time had been logging from the said Payne Cochrane tract of land. And the said Meigs testified that in his opinion with the uncertainty as to time of obtaining iron rails and engines or other camp equipment it would have taken in October, 1897, six months for one experienced in logging to have prepared to put two million feet of *lots* (logs) into plaintiff's boom at its said mills.

And defendant examined DANIEL G. AMBLER, the president of the said, The Atlantic Lumber Company on October 1st, 1897, who testified that he had had great experience as a logger of yellow-pine logs in Florida for twenty-five years; and that in his opinion in October, A. D. 1897, one experienced in logging with ample means could, irrespective of making a profit in logging, have prepared to deliver two

million feet of logs into plaintiff's said boom within two months, but to do it at a profit would have required six months.

And the said Meigs further testified that the market price of logs in Jacksonville was a little higher in 1898 than in 1897, and higher in 1899 than in 1898.

96 And the said CHARLES L. BUCKI and the said HEAGEY testified that in their opinion the plaintiff, in the fall of 1897, could have prepared and organized a force and equipment and put two million feet of logs per month into plaintiffs boom, within sixty days, if plaintiff could have commanded and controlled suitable logging equipment or the requisite means and capital for a suitable logging plant.

And the plaintiff adduced testimony tending to establish that after the service of the said writs of attachment upon its said properties it was deprived of the means and credit requisite to supply its mills with logs, and prevented it from continuing in its said business and in its usual course of business aforesaid.

And plaintiff adduced testimony tending to prove that soon after writs of attachment were levied, its officers made efforts to purchase standing timber for the purpose of supplying its mill with logs and that offers for the same of such timber and lands to plaintiff were made for cash, and that plaintiff was unable to buy them for want of means.

And plaintiff adduced evidence tending to establish that besides *that besides* the said timber and lumber levied on 3,600.00 feet were sawn from said 3,000,000 feet of logs levied on which became subject to said liens; that it had a considerable quantity of timber and lumber, to wit: one million feet, afloat in ships and vessels on the way to the purchaser which had not been paid for; that it owned good outstanding accounts and bills receivable to the amount and value of about $15,000 in the ordinary course of business; and that the market price in Jacksonville of all such timber and lumber was at least sixty-five thousand dollars.

And the plaintiff adduced evidence tending to establish that its said mill plant, docks, wharves, reservoir, boom pens, were constructed in the fall of 1892, and winter of 1893; that they were economically constructed, and cost, excluding the land and reasonable compensation for the plans and specifications for such plant, about one hundred and thirty thousand dollars; and also adduced testimony tending to establish that excluding the said reservoir or elevated tank, docks and wharves, boom pens, outbuildings and yard structures, the remainder of said plant could not have been duplicated in the fall of 1897, for less than seventy-five thousand dollars; and that said plant and properties were in good repair and condition on October 1st, 1897.

And H. S. MITCHELL, an expert mill-builder, whose business it was to contract for saw-mill machinery, testified that he had been
97 over the plaintiff's mill plants, and that he would not hesitate to contract to duplicate the same, not including the dry

kilns and planers, for $32,000.00. The planers would be worth from 12 to 1500 dollars apiece. That the average life of the machinery of a mill was 8½ years, that this had been in use longer than that. It was only of value as a person had use for it. Unless some one had use for it, $5,000 would be a good price. This estimate did not include either kilns, planers, docks, reservoirs or boom pens.

And plaintiff adduced testimony tending to prove that there were no liens, or encumbrances of any kind whatever upon any of its said mill plant, properties, or said timber and lumber, prior to the levy of the said writs of attachment, that all such timber and lumber had been paid for except a claim of the said The Atlantic Lumber Company for about nine thousand dollars for logs delivered.

And the said CHARLES L. BUCKI testified that no suit of any kind was pending against the plaintiff prior to the levy of the said attachments except that it had been garnisheed by a creditor of one of its creditors, for about twenty-five hundred dollars, which the plaintiff paid on October 4th, 1897. And no testimony was adduced by the defendant tending to contradict the said testimony of the said Bucki, as to suits against the plaintiff.

The plaintiff and the defendant put in evidence the plaintiff's book, which tended to prove that plaintiff's indebtedness of every kind on October 1st, 1897, including the said claim of the Atlantic Lumber Company, was about sixty-three thousand dollars, of which about thirty-two thousand dollars was held by the said Bucki, a director of the plaintiff company, and one Henry Weiler, of New York, also a director of the plaintiff company, on which the interest was kept promptly paid, and that neither the said Bucki nor the said Weiler was at that time urging payment of his claims.

Plaintiff also adduced evidence tending to prove that on October 1st, aforesaid, only one piece of its commercial paper was outstanding that was due and payable on October 1st, aforesaid, and that was a draft to the order of the said The Atlantic Lumber Company for the sum of $5,340.75, which said company had negotiated at the National Bank of Jacksonville, which held said draft on said day; that said draft was dated August 16th, 1897, due ten days after date; that $2,000 of said draft was for an advance on logs to be delivered by the said Atlantic Lumber Company after the date of the said draft; that said draft had been protested, and that
98 the plaintiff claimed that it was entitled to a credit of the said draft in the hands of the said bank on the ground that said bank should have applied the proceeds of a draft for $4,000 which it received while holding said draft for $5,340.75. That subsequently plaintiff paid said draft less an amount of $2,000 which defendant had paid.

It was established by the evidence and was undisputed that no commercial paper of the plaintiff has ever gone to protest prior to

June 2nd, 1897, and that its credit was good and excellent up to about that date.

And plaintiff read in evidence a letter in words and figures following, to wit:

JACKSONVILLE, FLA., *June 4th*, 1897.

Mr. Chas. L. Bucki, New York, N. Y.

DEAR MR. BUCKI: I regret exceedingly that the draft due on the 2nd inst., was allowed to go to protest. The bank here and you understand that there is only one here that we can obtain discount from, is very nervous in regard to the general business situation and any evidence of weakness alarms them. I think that it will be necessary for you to make further explanation to Mr. Barnett in regard to the reasons for this being protested. He does not seem satisfied with the simple statement that it was an error in noting the date on which the note fell due, as you were on the ground and — would seem that your bank should have notified you of such paper by phone, and given you an opportunity to have protected same, as he understands that the paper was made payable at your bank.

You understand of course that we are willing to accommodate you and do everything in our power to assist you, as we have entire confidence in your ability to pay and the responsibility of your company, butt you must realize that we are in the hands of this one bank. We have no banking connections anywhere else and it would be impossible for us to accept your time paper, unless we can use it, as this is the only bank where we can do so.

At the time this paper fell due you had about $36,000.00 but of course a large amount was paid on the 2nd, viz: about one-third of the total. As it now stands they have your paper for $21,570.74 besides $3,500.00 which you have given us as advance on logs in the pen, making in all about $25,000.00, but of course at settlement time there is, for a day or two, about $30,000.00 or $35,000.00.

I hope that you will make satisfactory explanation to Bar-
99 nett as I believe that will be to your interest as well as to ours to do so. We certainly have no desire to refuse to take your paper for such time as we are able to use the same, but of course if we are unable to discount, we shall be obliged to call for cash.

Hoping to hear from you by return mail, I am,

Yours very truly,

(Sig.) ARTHUR MEIGS, *G. M.*

And the said Meigs testified that all the indebtedness mentioned in the said letter was paid before August 16th, 1897. And the said Meigs and the said Ambler testified that the draft of plaintiff protested June 2nd, 1897, was paid the next day after protest; that no other draft of plaintiff went to protest before July 15th, of said year; and between July 15th and August 15th, several drafts of plaintiff went to protest, but that such protested drafts were paid within a few days after protest, and none remained unpaid over one week after they were due. The said Meigs and Ambler also testified for

defendant that the plaintiff paid in cash to the said The Atlantic Lumber Company, between September 14th and September 27th, 1897, about ten thousand dollars on account of logs delivered between August 14th and September 15th, 1897, in addition to the $2,000 advanced in the said draft of $5,340.75. And the testimony tended to establish that plaintiff had up to September 28th, in said year, including said $2,000 paid to the said The Atlantic Lumber Company, the contract price of all logs it had delivered up to the 15th of said month, except that said draft for $5,340.75 had not been paid. And plaintiff adduced evidence establishing that when said attachments were levied, neither of its principal officers or directors was in the State of Florida; that its president and one other director came from New York to Jacksonville, a few days after such attachments were levied, and by giving such indemnity bonds and otherwise made an arrangement with the sheriff, who had said attached logs in his custody, by which the said mills resumed operation on October 11th, in the said year and continued to run until November 16th, during which time at plaintiff's expense the said three million feet of logs were sawn into timber and lumber amounting to about three million six hundred thousand feet; which as manufactured became subject to the lien of the said attachment for $75,000 by the arrangement aforesaid.

Plaintiff adduced testimony establishing that neither the president nor any director or other managing officer having any duty or authority to finance the plaintiff company, resided in Florida
100 and that Charles L. Bucki, the president of the plaintiff was in the city of New York, State of New York, during most of the time of the months of June, July, August and September in the year aforesaid, that he had the principal charge and management of such finances during the said months; and that the plaintiff permanently kept an office at No. 9 Broadway in said city. And the testimony established that the drafts aforesaid that were protested were drawn in Jacksonville in the name of "L. Bucki & Son Lumber Company, by Jas. B. Rosser, auditor," on the said L. Bucki & Son Lumber Company, at No. 9 Broadway, New York city; some day after date; there being no uniform number of days mentioned in such drafts; and that it was the general duty of the said president to provide for the payment of such drafts which were drawn to the order of the Atlantic Lumber Company, and by it indorsed and negotiated at the National Bank of Jacksonville, of which William B. Barnett was the president and Bion H. Barnett the cashier. Plaintiff adduced evidence establishing that in the case of the first of the said drafts, that was protested on the 2nd day of June aforesaid, and was paid the next day, a mistake or error had been made in noting in the said New York office the date when said draft was payable and that between July 14th and August 16th, during which period all of the other protested drafts matured except the said draft of $5,430.75, which was dated August 16th, and due ten days after date, Charles L. Bucki was frequently out of the city of New York on account of ill health; and the plaintiff's business did not then have his personal attention. And it was a conceded fact during the

trial of this case that the plaintiff by a written contract made prior to the year 1897, which was put in evidence, had sold to the Yellow Pine Company, a corporation engaged in the yellow-pine lumber and timber business in New York city, nearly the entire output of plaintiff's said mills for the whole year of A. D. 1897, and that said product was to be paid for f. o. b. at Jacksonville aforesaid, the said contract providing that the said Yellow Pine Company should take all of the timber which was about two-thirds of the product of said mills and a certain percentage of the boards; and the testimony tended to establish that during the spring and summer of 1897, owing to a scarcity of coastwise vessels, vessels could not be chartered or were not chartered by said Yellow Pine Company to remove the product of plaintiff's mills from its wharves and docks, and that the said Yellow Pine Company claimed and insisted that it was not bound to pay for such product until it was on board vessels at Jacksonville, and that this caused an unusually large accumulation of timber and lumber on said wharves, and a temporary shortness in
101 funds to meet such drafts, which ordinarily would not have occurred, and also caused the said mills to shut down and cease to manufacture for several days in August and September, for want of space to pile the product of its mills on the said wharves in the usual course of business. And testimony was adduced tending to prove that in August and September, said year, plaintiff commenced to receive pay for its said timber and lumber, and the plaintiff had commenced to pay the said Atlantic Lumber Company in cash, for the logs delivered; and that early in October, after such attachments had been levied and while the said properties were under attachments, the plaintiff received from the said Yellow Pine Company $10,000 on account of shipments of lumber, which was used in the plaintiff's business. The testimony tended to prove that it was not disputed that the said Yellow Pine Company was a large business concern, and financially able to meet its obligation.

And testimony was adduced tending to prove that at no time prior to October 1st, 1897, had the plaintiff been refused credit in Jacksonville, Florida.

H. W. SIMMONS, a witness for the defendant, testified that he was financial manager of the L. Bucki & Son Lumber Company, during the months of June, July and August and September, 1897; that during the months of July and August the drafts of the plaintiff given the Atlantic Lumber Company on account of purchase price of logs, frequently went to protest, but, as a rule, they were taken up within a day or so after the same were protested, except a certain draft of $5,340.00, given in August, protested for non-payment in that month, and which had not been paid on October 1st, 1897, that the credit of the L. Bucki & Son Lumber Company, in August, 1897, was bad, and in September of that year it was very bad, and that in the month of September, 1897, the company was unable to obtain loans from New York banks, including the two banks with which it had been accustomed to do business; that on October 1st, 1897, it was necessary for the company to have a loan of $25,000.00,

in order to have gone on at all, and to have gone on successfully the company must have had a loan of $50,000.00, and the witness further testified that the funds of the company were during the summer of 1897, largely absorbed in paying notes on account of a dividend declared in the month of May, 1897, and that notes for this dividend had been given to two of the stockholders, Charles L. Bucki and J. D. Bucki, and that the other stockholders had not received anything on account of such dividends. And the said
102 Charles L. Bucki testified that H. W. Simmons had no authority to negotiate loans for the plaintiff at the banks in New York.

J. B. MURPHREE, a witness for the defendant, testified on cross-examination, that he was a salesman for the plaintiff on October 1st, 1897, and that he did not think that there was any reason for the failure of the L. Bucki & Son Lumber Company or for its being in trouble when properly financed.

And the plaintiff's attorney propounded the following question- to the said Murphree:

"Q. You state that the capacity of the Bucki Lumber Company was two million feet a month?

"A. I stated the capacity of the mill of the Bucki Lumber Company was about two and one-half million.

"Q. Now in order to recover from the blow of the attachment and get the business in condition to equal that capacity, it was necessary, was it not to obtain a large tract of timber land and railroad, a great number of mules, carts and harness, and an investment of anywhere from $150,000 to $250,000?

"A. If they expected to log the mill somebody would have to make an investment of not less than that for a railroad; either they would have to do it or somebody else would have to do it in order to furnish them with logs."

It was established by the evidence that the amount of cash on hand possessed by the plaintiff on October 1st, 1897, was one hundred and twelve and $\frac{37}{100}$ ($112.37) dollars.

ARTHUR STEVENS, a witness for the plaintiff, testified that the value of the mill formerly owned by the plaintiff depended upon the use a person would have for it, and it was worth from $5,000 to $75,000 according to the use it could be put to.

And the plaintiff adduced evidence supported by the testimony of the said Meigs, and not disputed, in the latter part of September, A. D. 1896, a severe storm or tornado tore down, or killed, the greater part of the standing timber, on a large area or pine forests in Florida, on or near to which area the Atlantic Lumber Company was then logging and that in the winter of 1897, with the permission of the plaintiff, the said Atlantic Lumber Company commenced to deliver into plaintiff's boom more than two million feet per month, and continued to so deliver for several months more

than two million feet, of logs per month, in order to save such timber from injury by the worms; and that for several months up to July of said year, plaintiff advanced to the said Atlantic
103 Lumber Company, the plaintiff's negotiable paper on account of such excess of logs, the Atlantic Lumber Company agreeing to pay such drafts when due; and pay interest on the same that such advances at times amounted to several thousand dollars, and continued until some time in July of said year.

And plaintiff proved by said Meigs the following settlements between plaintiff and the said Atlantic Lumber Company, which were in evidence, and are in the words and figures following, to wit:

JACKSONVILLE, FLA., *August 2nd*, 1897.

L. Bucki & Son Lumber Company in account with the Atlantic Lumber Company for logs delivered July 15th to 31st, inclusive, 1897.

July 15th, 363 logs	102,296 feet
July 19th, 386 logs	99,044 feet
July 21st, 385 logs	101,689 feet
July 23rd, 376 logs	100,565 feet
July 26th, 378 logs	91,739 feet
July 28th, 397 logs	89,878 feet
July 20th, 394 logs	91,766 feet
July 31st, 375 logs	100,481 feet
3,054 logs	777,458 feet

777,458 feet at $7.25	$5,636.57	
Less 60 ds. disc. 8 per cent	75.14	
	5,561.43	$5,561.43
15th, by advance on logs delivered		3,000.00
		2,561.43
Aug. 2nd, to advance on logs to be delivered		3,000.00
		$5,561.43

JACKSONVILLE, FLA, *August 16th*, 1897.

L. Bucki & Son Lumber Co. in account with the Atlantic Lumber Company for logs delivered Au'st 1st to 14th, inc., 1897.

Aug. 2nd, 353 logs	98,891 feet
Aug. 3rd, 390 logs	103,438 feet
Aug. 4th, 372 logs	98,941 feet
Aug. 5th, 383 logs	104,638 feet
Aug. 7th, 379 logs	91,345 feet
Aug. 10th, 361 logs	96,319 feet
Aug. 11th, 373 logs	96,285 feet

	Aug. 12th, 357 logs	99,159 feet
104	Aug. 13th, 357 logs	97,388 feet
		886,404 feet
		at $7.25
	Less 60 days disc. 8 per cent	85.68
		6,426.43
		6,340.75
	By advance on logs Aug. 2nd	3,000.00
	16th	3,340.75
	16th, to advance on logs to be delivered	2,000.00
		$5,340.75

Memorandum.

Delivery for period ending July 31st	777,458 feet
Delivery for period ending Aug. 14th	886,404 feet
	1,663,862 feet
Delivery as per contract should be	2,000,000 feet
Shortage on delivery, July 15th to Aug. 15th	336,138
Shortage on delivery up to July 15th	498,973
Total shortage on delivery up to Aug. 15th	835,111

JACKSONVILLE, FLORIDA, *Aug. 16th*, 1897.

Received from J. B. Rosser, auditor for the L. Bucki & Son Lumber Company, his draft on the L. Bucki & Son Lumber Company, New York city, dated August 16th, due ten days from date, or $5,340.75, which amount when paid will be in settlement of the above, but not otherwise.

THE ATLANTIC LUMBER COMPANY,
By ARTHUR MEIGS, *Gen. M'g'r & Treas.*

BION H. BARNETT, a witness for the defendant, testified that he was cashier of the National Bank of Jacksonville, Florida, and that prior to October 1st, 1897, the plaintiff had done such banking business as it transacted in Jacksonville, with his bank. That prior to July, 1897, his bank had been accustomed to advance the plaintiff from $2,500.00 to $5,000.00 in each month for a period of about five days, to meet its pay-roll, but that it did not make such advances during the months of August and September, and that in September, 1897, the credit of the plaintiff with the bank was limited, and the witness further testified that he did not regard the saw-mill plant of the defendant as proper security for a bank to make a loan upon.

105 JOHN N. C. STOCKTON, a witness for the defendant, testified that he leased the mill of L. Bucki & Son Lumber Company on February 22nd, 1897, for a period of one year at a rental of $1,000 a month, and that he only sawed about seven million feet of lumber during that year and did not saw any more because he did not wish to risk any more money upon it and that he did not believe that the mill could have made a profit of its business during the year 1898, if it had been run at its full capacity, owing to the depressed condition of the lumber market and it was further established by the evidence that the mill was run by said Stockton at a loss of $18,000.00.

And other evidence was adduced establishing that no settlements were ever made for logs delivered after the said settlement of August 16th, 1897; and that thereafter the said The Atlantic Lumber Company required payments in cash on account of the logs delivered between August 14th, and October 1st, 1897.

The testimony during the trial disclosed that there was a written contract between the plaintiff and the said The Atlantic Lumber Company under which the latter was bound to deliver into the boom pens of plaintiff two million feet per month of good merchantable pine logs for eight years, guaranteeing that such logs should average three and one-half per thousand feet; and commencing about the 1st day of *of* April, A.D. 1893, that certain witnesses testifies as to some of the contents of such contract; and thereupon the plaintiff offered to prove the execution of the said contract and offered it in evidence, *when* said contract is the words and figures following, to wit:

"Articles of agreement between the Ambler Lumber Company, a corporation of the State of Florida, of the first part, and Charles Lloyd Bucki, of Ellaville, Florida, of the second part.

The said parties each in consideration of the things herein agreed to be done and observed by the other, agrees as follows:

1. The party of the first part to deliver to said party of the second part, and he to receive from it at his log pens in Jacksonville, Florida, for the period of eight years, counting from the starting up of the mill hereinafter mentioned, good merchantable pine logs to the amount of one million five hundred thousand feet, board measure, according to Preston's rules of measurement, each month, provided that at any time within four months from the starting up of the mill, the quantity to be delivered per month may be increased at the
106 option of the party of the second part, on thirty days' notice so as, however, not to exceed two millions feet in any one month, and the amount so fixed shall be monthly delivered during the term of this contract; and provided further that all logs that may have been delivered and accepted previous to the starting up of the mill shall be treated as a proper delivery under this contract. Said logs shall average, according to Preston's scale, three and one-half logs to the one thousand feet, which party of the first part guarantees, and no deduction shall be made for the sap, and the party of the

first part guarantees that the sap on logs delivered during the term of this contract shall not exceed an average of four inches of the diameter of the log, at the small end, and if at the end of any six months such sap shall have exceeded an average of four inches of such diameter there shall be refunded the value of such average excess, anything herein to the contrary notwithstanding. At the determination of the contract all of the averages of the sap to be adjusted to cover the entire period, and if the average of logs delivered during the entire period shall be within the limit of four inches of sap, then any amount allowed for such excess shall be paid to the said party of the first part. All logs to be of good average lengths, say, from seventeen to forty feet. All logs are to be scaled at the small end and inside the bark according to Preston's rules, provided that all logs which shall be over forty feet in length, by special order of the party of the second part, shall be scaled by middle measurement under Preston's rules; and provided further, that the party of the first part may, if it desires, deliver logs over forty feet in length without specific orders, but in such case the logs shall be measured at the small end.

II. When the logs shall be ready for delivery at the log pens of the party of the second part the parties shall jointly select a surveyor whose wages shall be paid one-half by each party, who shall survey and scale according to Preston's rules, as the same shall be delivered at the said logs pens, and report thereon, in writing to each of the parties, and whose report shall be conclusive as to quality and quantity; provided that if either party shall in writing object to the surveyor so jointly selected, at any time thereafter, or in case of his death, or inability to serve, a successor or substitute shall be at once mutually chosen.

III. The said party of the second part shall have the privilege of ordering from said party of the first part, at pleasure, logs of specific length of thirty feet and less, which said parties agree to furnish; provided that whenever in the filling of such specific orders logs shall be supplied that scale less than at the rate of one thou-
107 sand feet to every three and one-half logs, such logs shall not be so counted as to effect the said average of three and one-half logs to the thousand feet.

IV. Until delivery by said party of the first part at said log pens, the expense and risk shall be exclusively that of the said party of the first part, but the party of the second part agree- to furnish at *its* expense, two men to assist in inloading the trains during the usual working hours at the mill without intermission for any reason, and to provide a log pen of sufficient capacity to hold two million feet of logs, board measure.

V. During the five years next succeeding this contract, the party of the second part is to pay said party of the first part at the rate of seven $\frac{25}{100}$ dollars per thousand feet of logs, board measure, for the logs delivered to him, measurement to be made as hereinbefore provided, and thereafter and during the remainder of the term of this contract, that is to say, during the three years next ensuing, at the rate of seven $\frac{75}{100}$ dollars per thousand. Payments shall be

made by the said party of the second part, and he hereby agrees to pay, on the first and fifteenth of each month for all previous deliveries, that is to say, on the fifteenth of the month, for the deliveries between that date and the last day of the preceding month, and the first day of the month for those between that date and the fourteenth of the preceding month, in drafts payable in bank in the city of New York, sixty days after the date thereof; but after one year from this date, party of the first part may demand cash, allowing a discount at the rate of eight per cent. per annum and the party of the second part shall, on such demand, pay the cash.

VI. In the event of the destruction by fire or other accident of the mill of the said party of the second part, or in the event of any casualty rendering necessary the stoppage of the mill for more than thirty days, in order to make repairs, then and whenever such stoppage shall be occasioned and notice thereof, in writing, be given, he shall not be required to take any logs after thirty days from the giving of the said notice until he can repair and resume operations; provided, and it is so expressly agreed by the said party of the second part, that he will proceed with due diligence to rebuild or make all repairs that may be needed to resume operations and to perform his part of this agreement. And provided further, that he shall pay, in such event, to said party of the first part the actual expense of it, feeding and caring for live stock and for salaries of men employed, choppers and teamsters, however, to be discharged.

108 VII. The party of the first part agrees to use its best endeavors to secure upon terms satisfactory to it a lease for the term of eight years, that is, the period covered by this agreement, of the eastern five hundred feet of the mill site, known as the Hardy mill site, near said Jacksonville, and assign same to said party of the second part, he agreeing to pay the taxes that may be assessed thereon during said term.

VIII. The party of the first part shall cause to be delivered to the party of the second part, the bond of D. G. Ambler in the sum of *of* $75,000 to enure in case of assignment by said party of the second part of this contract to the benefit of his assigns, conditioned to be void if the party of the first part shall keep and perform all and singular the terms of this contract on its part and indemnify the party of the second part for all damages he may sustain, liquidated and unliquidated, by reason of the failure or neglect of the party of the first part to carry out *and* all and singular the terms of this contract according to the true intent and meaning thereof.

IX. The party of the first part shall purchase from the party of the second part such of his mules, carts and other camp equipages as it may from time to time require in its business of logging, at a valuation to be fixed by arbitrators, one to be selected by each of the parties, who, in case they cannot agree, shall select an umpire, and their decisions or his shall be final and conclusive upon both.

X. Said party of the second part shall have the right to assign at any time this contract to a company which he may cause to be incorporated, but in such event he shall deliver to the party of the

first part his bond of indemnity in the sum of seventy-five thousand dollars, conditioned that said company shall in all respects well and truly perform all and singular, the terms of this contract, without default or dlelay.

XI. In case of any disagreement as to any matters arising out of this contract, as to the true interpretation thereof, or as to anything therein conttained, the same shall be submitted to arbitrators in the manner andl with the like effect hereinabove provided in relation to mules, carts and camp equipages, and if either party refuse, after ten days' written notice from the other, to select an arbitrator, the other of saidl parties shall then notify the one so *filing* (failing) or refusing of iits appointment of an arbitrator, to whom the whole matter shalll be submitted, and the decision of such arbitrator shall have the same force and effect as if he had been named as umpire; provided, however, either party may demand a statutory arbitration under the statutes of Florida.

XII. The said party of the second part shall, as soon as he
109 secures a proper mill site, proceed to erect a mill adapted to the carrying out of this contract on the said Hardy mill site or on some other site to be secured by said party of the second part, which other site shall be satisfactory to said party of the first part, and shall, within five months from the securing of a mill site satisfactory to the parties, have the same complete and ready for operation; and as soon as the mill is ready for operation, said party of the first part shall commence the delivery of logs under this contract; and this agreement is to continue in force during the period of eight years counting from the day when the said mill starts up. Provided that if he shall select another mill site than the said Hardy mill site, satisfactory to the party of the first part, the said party of the second part shall be at liberty to take the same and thereon erect his mill, and every provision and condition of this agreement shall be applicable thereto, with the same effect as though the said preferred site had been the one named herein, except that all the costs of securing the same and the rent thereof shall be exclusively borne by the said party of the second part.

XIII. This agreement is intended to bind the successors and assigns of the party of the first part, and the heirs, executors, administrators and assigns of the party of the second part, and in case of the breach of either of the parties of any substantial provision of this contract, the party committing such breach shall pay to the other, seventy-five thousand dollars as liquidated damages, that being the amount fixed by the parties as the damage which either would sustain by any such breach on the part of the other.

XIV. In case *of* the said Hardy mill site shall be taken as aforesaid by the said party of the second part there shall be secured to him an option for the purchase thereof within three months after the determination of said lease, at a price to be determined by arbitration, and it shall be provided that in case he does not exercise such option, he may remove his mill and appurtenances within six months after the determination of the lease.

It is also agreed that said party of the first part shall have a con-

venient right of way for its tracks over the said mill site and log pen, so as to enable it to conv-iently and expeditiously unload its cars and make up and drill its trains: and said party of the second part shall keep the logs cleared away from the track of the road as they are unloaded, so as not to hinder or delay the unloading, and the said log pen shall be so arranged by said party of the second part as to facilitate and expedite the unloading of said logs and shall have capacity for not less than two million feet, board measure, according to the aforesaid rule of measurement.

It is further understood that the party of the second part is to have the log pen ready for delivery of logs sixty days prior to the mill starting up. In case the party of the first part shall fail to furnish logs so as to keep the said mill fully supplied according to the terms thereof, then and in such event the party of the second part may procure logs from any other source, if he conveniently can, and the party of the first part shall pay the increase- cost of said log-, if any, to the party of the second part, provided that the party of the first part may, in case it shall not be satisfied with the increase-cost, pay instead thereof the actual cost of maintaining said mill, to include wages except of common laborers." In testimony whereof the parties have hereunto set their hands and seals, this the twenty-eight of June, 1902, the words "good and merchantable" on the first page, second page, "any;" on the third page, "as;" on the fourth page, "allowing a discount;" on the sixth page, "substantial provisions of," being first interlined.

AMBLER LUMBER COMPANY,
Per D. G. AMBLER,
ARTHUR MEIGS,
General Manager and Treasurer.
CHAS. LLOYD BUCKI.

And the said court excluded the said contract upon the ground that it was immaterial to any issue in this suit, that the defendant was not a party to such contract, and any question arising under it in connection with this suit had been fully adjudicated; and would not allow it to be read to the jury, to which ruling excluding the said contract the plaintiff then and there and before the jury retired, excepted, on the ground that the said contract was the best evidence of its contents, and on the ground that the contents of such contract *was* relevant to the issues, and material for the jury to know in order to be informed of the kind of logs called for by such contract, the dates of payment therefor, in order to decide correctly the relations between the parties to such contract, and to determine in connection with other evidence whether the plaintiff had any grounds to dispute the claim of the said Atlantic Lumber Company made for logs delivered prior to October 1st, 1897; and the foregoing exception constitutes plaintiff's first exception.

The plaintiff had before the said written contract had been offered in evidence, adduced testimony tending to prove that the logs the Atlantic Lumber Company had delivered for some time prior to

October 1st, in said year, were smaller *then* (than) called for
111 by the said contract, and that on September 11th of said year, plaintiff had notified the said Atlantic Lumber Company that the logs it had then been delivering were smaller than called for by the contract, and the plaintiff had also adduced testimony to prove that the said contract price of logs was $7.25 per thousand, and evidence tending to prove that such price was seventy-five cents per thousand feet above the market price in Jacksonville, for logs averaging three and one-half per thousand feet, during the year 1897.

It was a conceded fact in the trial of this action that the said Atlantic Lumber Company did not deliver any logs to plaintiff under said contract after September 30th, 1897, or under any other contract.

The defendant read in evidence so much of the summons and first declaration filed in the action in which the said writ of attachment for $9,980.80 was issued, as proved, that the *ad damnum* in said action was $15,000 and the plaintiff read in evidence so much of the declaration as proved that the said suit was brought to recover a balance claimed for logs delivered, and that such balance as stated in said declaration was the exact sum of $8,609.78; and it was a conceded fact that the said Atlantic Lumber Company asserted other claims against the plaintiff not arising from logs deliveries, amounting to about $1,800, which claims had been in existence for two years prior to October 1st, 1897, and were disputed by the plaintiff and which latter claim was asserted in an amended declaration in said suit afterwards filed. And that the plaintiff, The Atlantic Lumber Company, recovered a judgment for $8,600, which did not include the amount of the draft of $5,340.75 *dollars*.

The defendant also read in evidence so much of the summons and the declaration in the action in which the said writ of attachment for $75,000 was issued, as proven that the *ad damnum* in said action was $200,000. And it was a conceded fact during the trial of this case that the said damages of $200,000 *was* asserted on the averment and claim that on or prior to October 1, 1897, the plaintiff had breached the said written contract for log deliveries for eight years in such a manner as to excuse the said Atlantic Lumber Company for making further deliveries after September 30th, aforesaid, and conferred the right to recover future profits it would have made if it had completed the performances for log deliveries.

And it was a conceded fact in this case that on the trial of the motion to dissolve the said attachment for $75,000, it was decided by the said trial court, said motion being tried without a jury, that the said Atlantic Lumber Company had itself so broken the said written contract prior to Oct. 1st, 1897, as to defeat and prevent
112 the said Atlantic Lumber Company from recovering from the plaintiff any damages as profits which might have been made on the unperformed period of the said contract.

It was also a conceded fact at the trial of this action, and the records of the trial court proved, that the action claiming $200,000 damages came on to be tried the latter part of April, A. D., 1898, and after the jury had been impaneled, the plaintiff, the said Atlan-

tic Lumber Company, read to the court a previously prepared written statement of all the facts it could prove to support its said action, and thereupon the said trial court ruled and decided in the words and figures following, to wit:

"Upon presentation of the foregoing statement, it appearing therefrom that the plaintiff in the months of June, July, August and September, 1897, delivered logs less in size than ones averaging 3.50 to the 1,000 feet, board measure, according to Preston's rules, the court considers that the plaintiff cannot recover on the causes of action set forth in the 3d, 4th, 5th, 6th, 7th and 10th counts of its declaration, and accordingly instructs the jury to find a verdict for the defendant on those counts, to which plaintiff excepts. And it is ordered by the court that this statement be made a part of the record in this cause.

"Done and ordered in open court on this the 25th day of April, 1898.

"JAMES W. LOCKE, *Judge.* [SEAL.]"

Which ruling and decision the plaintiff in this case put in evidence as well as the final judgment hereinbefore set forth, on the merits of the said action, claiming damages for $200,000.

And such further proceedings were had during the trial of this action that after the testimony had all been adduced and closed, both on behalf of the plaintiff and defendant, and as the plaintiff's attorney was about to address the court and jury on the issues of law and fact, defendant, by its attorney, made a motion in writing, which is in the words and figures following, to wit:

L. BUCKI & SON LUMBER CO.
vs.
THE FIDELITY & DEPOSIT CO.

Defendant's Motion to Withdraw Testimony from the Consideration of the Jury.

Now comes the defendant by its attorneys and after all the testimony had been taken by the plaintiff and defendant, moves the court to exclude from the consideration of the jury the following testimony:

113 1. All testimony in regard to the profits that the plaintiff's mill had been making prior to October 1st, 1897, on the grounds following:

A. Because loss of profits on the operation of the mill are not a proper element of damages in this case.

B. Because the profits that the plaintiff may have made in the past are not a proper criterion of what it would have earned in the future.

C. Because the said estimate of $7,500.00 a month, was stated by the witness who made it to have been based on the "cost of the logs, the cost of the manufacturing and the net result of the sales, the actual sales, deducting one from the other, and taking off the cost of

selling," which is an unintelligible statement, and because the witness that made it admitted in cross-examination that he did not know what the lumber on hand sold for.

D. Because even if such testimony tended to prove that plaintiff had lost profits by reason of the attachment, such loss would be speculative and too remote as a reason of damages in this case.

2. All testimony relative to the cost of manufacturing lumber, and the supply of the timber lands and logs, on the grounds following:

A. That such evidence is incompetent, and

B. That loss of profits by reason of the plaintiff's inability to operate its mill after November 16th, 1897, cannot be recovered in this suit, and

C. Because the plaintiff has adduced no testimony to show that it could have gone on with its business after November 16th, 1897, even though no attachment had been levied, and

D. Because the testimony demonstrates conclusively that the plaintiff could not have operated its mill at a profit, even though no attachment had been levied.

3. All testimony in regard to damage to credit and loss of profits as a consequence thereof.

A. Because the plaintiff had adduced no testimony to show that it had any credit prior to October 1st, 1897.

B. Because the plaintiff had not shown that it could have obtained a loan of the funds necessary to carry on its business, even though no attcachment had been sued out against it.

C. Because the testimony of the plaintiff shows conclusively that the plaintiff had no credit on October 1st, 1897.

4. All testimony in regard to the salaries and loss of time of the salesmen Furfree and Cohen.

A. Because the evidence fails to show that the said salesmen could have made any sales during the time the mill was shut down.

114 B. Because the evidence shows that all said lumber was sold and shipped prior to January 1st, 1898, the time at which the employment of said salesmen terminated.

D. Because the loss of the service of the employés did not result directly from the levy of the writ of attachment.

E. Because it was not shown that the mill would have run had no attachment been levied.

5. All testimony in regard to the salary and loss of time of the secretary, and the New York book-keeper, on the same grounds lost above, except the first and second, and because it was not shown that said employés were idle, or if idle, what the value of their lost time was.

6. All testimony in regard to the salary of the president of the mill, the superintendent and stenographer, and the planing mill superintendent.

A. Because the loss of the services of these officers, if loss there was, did not result directly from the levy of the writ of attachment, and are not proper elements of damages herein.

B. Because there is no evidence to show that said employés were idle from October 1st to October 10th, 1897.

D. Because the mill manufactured the average monthly quantity of lumber in October, 1897, and it appears that the plaintiff got substantially the same amount of services out of these employés as in other months.

E. Because the mill finally shut down November 16th, 1897, within the year for which these employés were employed, and ten days later than it would have shut down, but for the shut down in October, 1897.

7. All evidence relative to the market price of lumber subsequent to the 6th day of February, 1899, because on that day, the ownership of the mill property passed out of the possession of the plaintiff.

R. H. LIGGETT,
D. U. FLETCHER,
Defendant's Attorneys.

And on consideration of the said motion, the said court ruled thereon in writing in words and figures following, to wit:

This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, any damages arising from the consideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all
115 testimony to the damage to credit, loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment and the motion be denied in all other respects.

Feb. 1st, 1900.

JAMES W. LOCKE, *Judge.*

And the said trial judge expressed his oral opinion in the words and figures following, to wit:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully satisfied in my own mind that damages from the loss of profits arising from the subsequent or future business which might possibly have been carried on is under the evidence, too remote and speculative for the testimony to go to the jury. Some courts have held that every fact should go to the jury to be considered, but the United States courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable court could view it in but one light, the court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. If there was no combination of circumstances other than the attachment; had a third party come in and levied an attachment and stopped the business, and there had been no suspension save by

the attachment, then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common-law suits, so changed the circumstances that there is no certainty that there could have been any profit.

Every author of authority referred to, even by the plaintiff's attorney, says that there must be some certainty.

Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have been procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding perhaps large damages against the defendant in
116 this case on account of loss of credit and profit—from the levying of the attachments."

To which ruling, the plaintiff, by its attorney, then and there and before the jury retired, excepted on the grounds:

1. Because the ruling of the court invades the plaintiff's constitutional right to trial by jury as to the question whether plaintiff could have continued its business and in the usual course of business if these attachments had not been levied.

2. The theory of the declaration upon which the plaintiff proceeded in the trial of the cause was that the attachments interrupted the business of the plaintiff and caused its interruption for a long period of time, and that the plaintiff was entitled to prove and submit to the jury the question as to the loss of the use of its mill properties in consequence of these attachments. That during the taking of the testimony the court repeatedly sustained the theory of the plaintiff, and on the objection of the defendant overruled objections of the defendant that testimony was not admissible to prove the past profits of the plaintiff's properties prior to October 1st, 1897, as a basis upon which to estimate the profits the plaintiff lost after October 1st, 1897, as a consequence of these attachments. That the ruling of the court by the said order and decision has now taken the plaintiff by surprise, for if the court had excluded the testimony offered by the plaintiff, and by the defendant also, tending to establish the profits the mill made up to October 1st, 1897, for the purposes of estimating the profits that would have been made subsequently if the attachments had not been levied, the plaintiff would have proceeded upon another theory to show other and different damages, which relying upon the rulings of the court, the plaintiff did not offer, to wit: testimony, some of which was offered and excluded, tending to show the deterioration of the property while the attachments were pending; testimony tending to establish more than by mere incidental evidence the taxes, costs of repairs, costs of insurance and costs of keeping watchmen, and to have introduced further testimony tending to show the amount of capital invested

and the rental value of the property, and for these reasons the ruling of the court has taken plaintiff and his counsel by surprise, and to the plaintiff's prejudice, and tends to destroy the right of the plaintiff to a fair trial by jury.

And this constitutes plaintiff's second exception.

And thereupon the plaintiff made and submitted a certain motion in writing, in the words and figures following, to wit:

In the Circuit Court of the United States, Southern District of Florida.

117 L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff by H. Bisbee, its attorney, and moves the court to discharge the jury in this case, and continue and postpone the trial of the case to some future day of this term on the following grounds:

First. Upon the issues made by the pleadings in this action, the plaintiff entered upon the trial and continued in the trial thereof until the testimony was closed upon the theory and belief that if the plaintiff could prove that on October 1st, 1897, when these attachments were levied, it was then and had been for over four years engaged in an establishing business of manufacturing and selling yellow-pine timber and lumber, and that up to said first day of October, its said business was a profitable one; and prove that as a direct consequence of such attachments, the plaintiff's business was broken up, interrupted and destroyed, for a period of time as such consequence of said attachments; then one element of plaintiff's damages would be the profits it lost in its said business after October 1st, 1897, in consequence of such attachments. That the court, over objections of the defendant, repeatedly ruled and held that testimony offered by the plaintiff was admissable and admitted such testimony to prove the profits the plaintiff made in its business for several months prior to October 1st, 1897, and the defendant also adduced testimony tending to establish the amount of the profits of such business for several months prior to October 1st, 1897. That such repeated rulings of the court led the plaintiff and its counsel to believe, and they did believe that such theory was in law correct, and that the court would submit such testimony to the jury, to be considered by it in assessing the amount of damages plaintiff had sustained in consequence of such attachments, in connection with the question whether or not the plaintiff would have been financially able to continue its business after October 1st, 1897, during the period of time such attachments were existing and operative. That after the testimony in said action was closed on both sides, and before any augument of said cause to the court or jury, the court, on the motion of defendant, after argument of such motion, ruled and decided to exclude from the consideration of the jury all such testimony and evidence, and also ruled and decided that the evidence adduced as to the

financial ability of the plaintiff on October 1st, 1897, to have continued in business during said period of time if such attachments had not been levied. The court on said motion also ruled
118 and decided that the question whether or not the said attachments were the direct cause of preventing the plaintiff from continuing in business after October 1st, 1899, for the period aforesaid would not be submitted to the jury for its decision.

By such rulings of the court on the said motion and after the testimony in the case had been closed, the plaintiff and its attorney have been taken by surprise, to plaintiff's prejudice. That if said testimony of the plaintiff in respect to profits prior to October 1st, 1897, had been excluded when offered, the plaintiff would have and could have adduced other evidence establishing other elements of damages, to wit: loss of profits on timber and lumber to large amount, which such attachments prevented the plaintiff from delivering under contracts prior to October 1st, 1897, and which by such rulings plaintiff did not consider relevant or material.

Also but for the reason aforesaid, plaintiff could have adduced evidence establishing the losses it sustained by decay and deterioration of its mill properties, docks and wharves connects with said mill, and costs of repairs, while said mills were idle and not used, in consequence of such attachments, and the exact amount of taxes paid, and exact amount paid watchmen while said mill was so idle.

And on the further ground that a party to a suit during the taking of testimony cannot proceed on a certain theory of the law of the case, and after the testimony is adduced, change his position and ask instructions on another theory, to his adversary's prejudice, and what a party to the said suit cannot do, the court itself cannot do to the prejudice of a litigent.

(Signed) H. BISBEE,
Plaintiff's Att'y.

Which said motion the said court denied, upon the grounds that the plaintiff's counsel had had ample notice from the pleadings in the case that such testimony, relating to the damage to credit and loss of future profits, was only permitted to be introduced to determine how far it could prove certain and direct damages as the reasonably necessary result of the levying of the attachments, and that unless such damage was shown to be the direct and certain result from such cause, the court would order it withdrawn from the jury.

That the case stood for a long time upon the order striking certain matters of damages from the declaration and it was only admitted upon the urgent application and argument of the plaintiff's counsel that it was impossible to determine until the testimony was heard, how positive and certain such damages might be shown
119 to have been the direct result of the levy of the attachments and to the denial of such motion the plaintiff then and there and before the jury retired, excepted, for the reasons and grounds stated in the said motion, and this constitutes the plaintiff's third exception.

And during the argument by plaintiff to the jury, by its counsel, the latter said:

I don't know how to argue it in, your honor. You permit me to consider the evidence as to previous profits of the mill up to October 1st, for some purpose, what purpose, I don't know.

To which the court replied: To show the damages suffered while the property was in the custody of the sheriff under the attachment. The evidence shows it was released on the 11th of October.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

"It is a question of fact for you to determine whether or not if these attachments had not been issued and levied, the plaintiff would have been able to supply its mills with logs after such attachments and to what extent plaintiff would have been able to supply its mill with logs and continued in its business and the amount of profit it would have made in such business in case said attachments had not been issued, provided you believe from the evidence that the direct consequence of such attachment caused the plaintiff to cease continuing in its business and deprived it of its means of continuing in business and that plaintiff would have and could have continued in business if such attachments had not been issued and levied and continued upon plaintiff's properties."

And the court refused to give such instruction to the jury and to the refusal of the court to give said instruction, the plaintiff then and there, and before the jury retired, excepted, on the grounds,

1st. That by such refusal the plaintiff was deprived of the right to have a material question of fact tried by jury.

2nd. Because there was ample evidence upon which to submit such question of fact.

3rd. Because the said instruction embodied a correct principle of law applicable to the facts and evidence adduced in the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

"The question whether or not the plaintiff was deprived of the means and financial ability to supply itself with logs for its mill and continue in business after October 1st, 1897, as a direct
120 consequence of the issuing and levying of these attachments is one for the jury to decide.

Whether or not the plaintiff would have been financially able to continue in its usual business after October 1st, 1897, if these attachments had not been levied is a question of fact for the jury to decide upon a consideration of all the evidence in the case."

Which instructions the court refused to give, and to the refusal of the court to give said instructions plaintiff then and there, before the jury retired, excepted on the grounds that such instruction presented and embodied correct rules of law, and requested the submission to the jury of material questions of fact.

And the testimony being as hereinbefore set forth in the bill of

exceptions, the court was requested to instruct the jury as follows, to wit:

If you believe from the evidence that the issuing and levying of these writs of attachment injured and impaired the credit or financial standing as it existed on October 1st, 1897, then the plaintiff is entitled to recover such damages for injury to its credit as you find from the evidence the plaintiff sustained as a direct consequence of the issuing and levying of such writs upon the property of the plaintiff.

And the court refused to give said instructions to the jury, and to the decision of the court refusing to give such instructions to the jury, the plaintiff then and there, before the jury retired, excepted, on the grounds first, that there was ample grounds upon which to properly submit such instructions to the jury.

2nd. That such instructions embodied a correct proposition of law, applicable to the facts of the case.

3rd. Because said instructions presented a material question of fact.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

On the subject of the financial condition of the plaintiff with respect to its ability and means of continuing in its business after October 1st, 1897, you must understand that the question to determine *in* (is) not the opinion that any officer of the Atlantic Lumber Company entertained of the financial condition of the plaintiff, nor is it the question of the opinion entertained by any particular bank or other business house as to plaintiff's financial standing, especially as if difference or controversies arise between them.

The real question before you is what was the general financial condition of the plaintiff on October 1st, 1897, in respect to its ability and means of continuing business, if these attachments had not been levied, and in reaching a conclusion on this subject it is your duty to give weight to and consider the amount and value of all its property, its mill plant, lumber, timber and logs on hand and good outstanding claims against third parties, and the amount of its liabilities due and not due on October 1st. You should also consider its business connections with those engaged in the lumber business, the good will of those engaged in such businesses, and its facilities for doing business, finding a market for the product of its mills, and of supplying itself with logs for its mills.

121

You have heard the testimony as to the available round timber or logs on and after October 1st, 1897, and from this evidence, applying your common sense to the subject, you will conclude whether or not it is reasonably probable or certain that the plaintiff with such means as it had at its command would have been able to have supplied its mill with logs during the time attachments rested on plaintiff's property, if these attachments had not been levied, whether what one has done, another with equal means and skill can do, is not a question of science or law, but one of fact for you to decide.

Which instruction the court refused to give, to which refusal the

plaintiff then and there, before the jury retired, excepted on the ground that it presented correct rules of law, applicable to the case and upon material questions of fact to be decided by the jury, and said instructions was necessary to aid the jury to properly understand the questions to be decided.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows:

"If you believe from the evidence that after allowing all credits due for logs delivered prior to September 15th, 1897, the L. Bucki & Son Lumber Company on September 30th, 1897, did not owe the Atlantic Lumber Company for any logs delivered prior to September 15th, 1897, then the court instructs you that on October 1st, the Atlantic Lumber Company had no cause of action against the L. Bucki & Son Lumber Company on October 1st, 1897, for logs delivered between September 14th, and October 1st, 1897, and you will consider this fact in connection with the question of the financial condition and standing of the plaintiff on October 1st, 1897. The plaintiff was not in default for not paying for logs, for the logs delivered after September 14th, 1897, until after midnight of October 1st, 1897."

Which instruction the court refused to give on the ground
122 that such question had been fully adjudicated by this court in another suit, to which refusal to give said instruction, the plaintiff then and there, and before said jury retired, excepted on the ground that such instructions embodied correct rules of law applicable to material issues in the case, as one material question before the jury was the financial condition of the plaintiff on Oct. 1st, 1897, when the writs of attachment were levied.

And the testimony being as hereinbefore set forth in the bill of exceptions, and testimony having been adduced tending to prove the facts upon which the instruction was based, the court was requested to instruct the jury as follows, to wit:

"If you believe from the evidence that the Atlantic Lumber Company had endorsed and negotiated the draft of August 16, 1897, for $5,340.75, and that on the first day of October, 1897, the National Bank of Jacksonville was the holder of that draft, then the court instructs you that the Atlantic Lumber Company had no right to demand the payment of the amount of that draft to it on October 1st. 1897, and you will also consider that fact in connection with the question of the financial standing of the plaintiff on October 1st, 1897, the question of the financial standing of the plaintiff with the National Bank of Jacksonville is not to be confounded with or affected by the financial standing of the Atlantic Lumber Company with said bank; and if you believe from the evidence that the plaintiff *bona fide* claimed while said bank held the said draft for $5,340.75, that it, the plaintiff, was entitled to a credit of said draft of the proceeds of another draft for $4,000 and that after October 1st, 1897, said bank took and discounted other negotiable paper of the plaintiff, then you should consider these facts in reaching any conclusion as to the financial standing of the plaintiff with the said bank. You will not allow your minds to be influenced on the sub-

ject of the financial standing of the plaintiff with the National Bank of Jacksonville, on account of or by reason of any indebtedness by the Atlantic Lumber Company to such bank, for which the plaintiff was in no way liable."

Which said instruction the court refused to give, on the ground that all such questions had been finally adjudicated in another cause, and to such refusal the plaintiff then and there and before the jury retired, excepted on the ground that it presented material facts for the jury to consider in respect to the financial standing of the plaintiff, and embodied correct rules of law.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court (was) requested to instruct the jury as follows, to wit:

123 The amount of debts which in the business the plaintiff was engaged in owed and is able to carry and continue in business and ultimately pay and continue in business is not a question of law or science, but is a question of fact, for you, as twelve sensible men to decide. In this matter you will exercise and apply your knowledge of business affairs. You will apply your own judgment, and knowledge as to the amount of debts in comparison to its assets, the plaintiff could probably carry and continue in business.

Which instruction the court refused to give, to which refusal the *court* (plaintiff), then and there, and before the jury retired, excepted, on the ground that it correctly embodied a rule of law applicable to the facts, and presented a material fact for the jury to decide, and it was improper not to submit such question to the jury.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

"In determining whether or not it was reasonably probable that the plaintiff would have been able to continue in its business, and in its usual course of business, if these attachments had not been issued, you will take into consideration the amount and value and availibility of the plaintiff's assets, its business and trade connections, and the reputation it had of manufacturing and delivering lumber according to its obligations on and prior to October 1st, 1897, and the patronage it had enjoyed. These assets consisted of its mill properties, lumber and timber on its yards and wharves and afloat in transit; and what was due and payable to plaintiff on October 1st, 1897. You will also take into consideration the amount of debts and obligations the plaintiff owed on October 1st, 1897, as well those due *and* those then to become due." Which the court refused to give, and to such refusal plaintiff then and there and before the jury retired excepted, on the ground that such instructions embodied a correct rule of law, applicable to the case.

And the testimony being as hereinbefore set forth in the bill of exceptions and testimony having been adduced tending to prove the facts upon which this instruction was based, the court was requested to instruct the jury as follows, to wit:

If upon all the evidence before you, you believe the plaintiff would have been able, if these attachments had not been levied, *you* have supplied and obtained logs for its mills, and continued in its usual business after October 1st, 1897, for the period of time these attachment liens prevented plaintiff from using its mills, then you will award damages for the use of its properties as you have been before instructed.

Which instructions the court refused to give, as the same
124 were substantially contained in the general charge to the jury, and to such refusal the plaintiff then and there, and before the jury retired, excepted, on the grounds that the plaintiff was entitled to have the jury decide the facts presented by such requested instructions, and presented a correct rule of law.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

In determining this question of the probable ability of plaintiff being able to continue in business and in its usual course of business on and after October 1st, 1897, so far as any debts it then owed are considered, you will consider all the evidence; the amount and probable value of all its property and assets it then owned, including just claims and demands the plaintiff had against third parties, the condition of its business and of the lumber at that time, and the probable condition of such business in the then future.

You will also consider the amount of debts plaintiff owed on October 1st, 1897, when they became due and payable; the means it had, and probably would have by the sale of lumber and otherwise to meet such debts; or to obtain an extension of time of payment of such debts; until the plaintiff could pay them from its business.

Which said instruction the court refused to give to the jury, to which refusal the plaintiff, by its attorney, then and there and before the jury retired, excepted on the ground that it embodied a correct rule of law, applicable to the case and called upon the court to submit to the jury facts material to the plaintiff's case and was injured by such refusal, and plaintiff was entitled to have the facts presented, by such request submitted to the jury.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

If you believe from the evidence that the direct and proximate effect of these attachments was to create a lien upon substantially all the assets and properties of the plaintiff; and that in consequence of such liens upon the said properties, the plaintiff did not own and control the means and did not have the requisite credit to enable it to purchase logs and continue in its usual course of business; and that if such attachment had not been issued the plaintiff would have been able to continue to purchase a full supply of logs for its mills and continue in the usual course of its business, then the court instructs you that then plaintiff is entitled to recover from the defendant such sum of money as will compensate the plaintiff for all losses it sustained by reason of such attachments.

125 And the court refused to give said instruction- to the jury, and to the refusal of the court to give said instructions, the plaintiff then and there, and before the jury retired, excepted, on the grounds that the said instruction- embodied a correct rule of law applicable to this case, upon material questions of fact. And that the refusal to give such instruction was prejudicial to the plaintiff, and deprived the plaintiff of the right to have material questions of fact submitted to the jury.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

If you find from the evidence that the value of the use of the plaintiff's mill properties, and business, or its net income, for the nine months, a given sum of money per month, it does not follow that it is your duty to award the plaintiff such sum of money for each month subsequent to the attachment, during the period of time you find plaintiff was deprived of its use of its properties in consequence of such attachments.

The value of the use of plaintiff's properties and his business after October 1st, 1897, may be more or less per month than for the time previous to October 1st, 1897. The question you must determine from the evidence, and arrive at — the amount or damages from the loss of the use of plaintiff's properties, after considering all the evidence as to the probable condition and value of plaintiff's business, after October 1st, 1897, during the time the plaintiff lost the use of its properties, by reason of *much* attachments. You will also consider the time that may have been lost by the shutting down of the mill by breakage or otherwise; and if you believe from the evidence that the plaintiff had been able to continue in its business from April, 1893, to October 1st, 1897, with only such temporary interruption as is unavoidably incident to such business, then the presumption is that the plaintiff could have continued to carry on its business in the usual way, after October 1st, 1897; in the absence of evidence to the contrary and the burden of proof is upon the defendant to establish to your satisfaction that the plaintiff could not have continued in business, even if the attachments had not been issued, and if the evidence does not overcome such presumption, then you will find against the defendant on this branch of the case.

And the court refused to give such instruction to the jury, and to the refusal of the court to give such instruction to the jury, the plaintiff, then and there, and before the jury retired excepted upon the ground, that said instruction embodied a correct principle of law applicable to the facts of the case, and presented material questions of fact for the jury to consider.

126 And the testimony being as hereinbefore set forth in the bill of exceptions, and testimony having been adduced tending to prove the facts upon which this instruction was based, the court was requested to instruct the jury as follows, to wit:

You have heard the evidence in respect to the magnitude and volume of the plaintiff's business for nine months and more, prior to the date of the attachments, and in respect to the condition of

that business on that day the attachments were levied, and it is your duty, to weigh and consider that evidence carefully and deliberately, in order to determine the value of the plaintiff's business for those nine months, or more.

The court refused to give said instructions to the jury, and to such refusal of the court the plaintiff then and there, and before the jury retired, excepted, on the ground that it presented a material question for the consideration of the jury, and contained a correct proposition of law, applicable to the facts in evidence and was of a series of instructions applicable to the facts of the case.'

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

If from the evidence you can ascertain with reasonable certainty the net income of the plaintiff's business for the nine months prior to these attachments, then you have a right to consider, and it is your duty to consider the amount of such net income for the said nine months, as a basis and evidence upon which to estimate the amount of the plaintiff's net income would have been after the attachments were levied if these attachments had not been levied and continued on the plaintiff's property, and the plaintiff had continued in the usual course of business.

Which the court refused to give the jury and to the refusal of the court to give said instruction to the jury, the plaintiff then and there, and before the jury retired, excepted on the ground that it was an appropriate instruction, and contained a correct rule of law applicable to the facts of the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

The net profits of the plaintiff's business prior to October 1st, 1897, you will consider with all the other evidence in estimating the amount of profits which you believe the plaintiff would have made after October 1st, of said year, if these attachments had not been levied upon plaintiff's properties, and which you will find
127 that the plaintiff was prevented from making by the direct and proximate consequence and effect of issuing and levying these attachments.

And the period of time during which the plaintiff was so prevented from operating its mills and from making profits is for you to decide upon all the evidence of the case, and you are instructed that the testimony as to the profits of the plaintiff's business has not been excluded from your consideration.

Which instruction the court refused to give, to which refusal the plaintiff then and there, and before the jury retired excepted on the ground that it embodied correct rules of law, and were applicable to the facts of the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

The court instructs you to award damages to the plaintiff which it sustained by reason of or in consequence of the levy of the attachments upon all the timber and lumber and logs attached and to award such damages for the entire period of the time the lien of the said attachment remained and continued upon the timber and lumber and logs without any deductions from such damages from the fact that forthcoming bonds or indemnity bonds were given by the plaintiff.

If you find from the testimony that there is no other satisfactory evidence of the amount of such damages for the time the liens of the attachment remained and continued operative upon such timber and lumber then you may allow the plaintiff eight per cent. interest per annum upon the market value of such timber and lumber from the time of the attachments to the time when the lien of such attachment was released and discharged from this property, or its proceeds in its business, free and clear of any lien of such attachments.

Which said instruction the court refused to give to the jury and to such refusal the plaintiff then and there and before the jury retired, excepted on the ground that said instruction embodied correct principles of law, and because defendant is not entitled to any mitigation of damages by reason of plaintiff's giving forthcoming bonds.

And the court gave the jury the first part of said instruction as modified by striking out the words "without making" and inserting in lieu thereof the word "considering," to the giving of which the plaintiff then and there excepted on the same grounds stated for refusing to give said instructions without any modification.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as
128 follows, to wit:

If you believe from the evidence that the direct consequence of the said writs of attachment and the levying of the same upon logs and other properties of the plaintiff levied upon would have caused the suspension of the plaintiff's business for the period of time which it would have taken the said saw-mill to have sawn up said logs in the usual course of business, then the plaintiff is entitled to damages for the loss of the use of its said mills, and the suspension of its business during the period of time without any deduction or mitigation of damages from the fact that the plaintiff operated its mill and sawed up such logs with the consent of the sheriff or from fact that the plaintiff gave an indemnity bond to the sheriff or a forthcoming bond.

In such case the damage to the plaintiff was caused by levying of said writs when they were levied and the plaintiff owed no duty to the defendant to apply for and obtain such consent to the sheriff, or to give the sheriff any indemnity or forthcoming bond to enable it, the plaintiff, to saw up such logs.

Which instruction the court refused to give to the jury, to which refusal the plaintiff then and there, and before the jury retired excepted on the ground that it embodied correct rules of law, applicable to the facts in the case, and because the defendant was not entitled to any mitigation of damages because if any benefit the

plaintiff derived from collateral transaction with the sheriff a third parties, which defendant was a stranger.

The court gave to the jury the foregoing instruction, as modified by striking out the words "without any" and inserting in lieu thereof, the word "considering," to the giving of said instruction, the plaintiff then and there, and before the jury retired, excepted, on the grounds that there is no rule of law to support such an instruction, and on the ground that any benefit derived by giving such indemnity and forthcoming bonds, or operating its mills under an agreement with the sheriff, is not a ground to mitigate damages, and on the ground that there was no evidence, upon which such benefits could be estimated with any reasonable certainty.

And the testimony being as hereinbefore set forth in the bill of exceptions, and testimony having been adduced tending to prove the facts upon which this instruction was based, the court was requested to instruct the jury as follows, to wit:

"The giving of the indemnity bonds to the sheriff to enable the plaintiff to ship any part of the timber and lumber and account to the sheriff for its proceeds does not give the defendant in this suit any right to have the damages reduced that the plaintiff sustained in consequence of such attachment."

Which instruction the court refused to give to the jury, and
129 to which refusal the plaintiff, then and there, and before the jury retired excepted, on the ground that it embodied a correct rule of law, applicable to the facts of the case, and that the defendant was not entitled to any mitigation of damages arising from any benefit received by the plaintiff by any contract with the sheriff, to which defendant was not a party.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

The defendant's attorneys have, during the trial of this cause, announced that the Atlantic Lumber Company is under obligations to pay whatever judgment may be recovered in this case against The Fidel-ty & Deposit Company, the defendant here.

"The court instructs you that you will exclude entirely from your consideration such announcement by defendant's attorneys; and that you must not allow yourselves to be influenced in the slightest degree by any consideration as to who is liable to pay such judgment as may be recovered in this action. You have sworn to truly assess the damages in this action, and any failure to keep that oath would be a flagrant disregard of your duty as jurors."

Which instruction the court refused to give to the jury, and to its refusal to give such instruction, the plaintiff then and there, and before the jury retired, excepted, on the ground that it embodied a correct rule of law applicable to the facts in the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

"While the attachments were pending, it was not the duty of the plaintiff's stockholders to raise and put new capital into the busi-

ness in order to continue the same, or lessen the damages it might sustain in consequence of these attachments. The stockholders owed no such duty to defendant."

Which instruction the court refused to give to the jury, to which refusal to give such instruction, the plaintiff then and there, and before the jury retired, excepted, on the ground that said instruction embodied a correct rule of law, and was applicable to facts in evidence.

The testimony being as hereinbefore set forth in the bill of exceptions, the court instructed the jury, of its own motion, in the words and figures following, to wit:

"All these questions that have come up in regard to the damages; all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider; the only
130 question is a clear-cut question; it is how much damages did the Bucki Company suffer. This question becomes more difficulty by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied, there were two common-law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that the Atlantic Lumber Company cancelled its contract or considered it cancelled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs and the common-law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.

The law is distinct that where a party sets in motion a wrong, an intervening wrong will not prevent the party instituting or setting in force that wrong, from being liable for all damages which can be directly traced to that.

But in this case, the attachment did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common-law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments; not how much they suffered by reason of all the attending circumstances, but how much they suffered by reason of the issuing of the attachments.

If there is any question upon which the court considers a verdict would not be justified and any way in which it might be viewed, then it is the duty of the court to withdraw from the jury that question.

As I say, that law is that all the damages that can be awarded against a surety on the bond where there is no malice alleged, where a party merely becomes responsible for the direct damages that have been caused, the damages must be strict and positive.

Taking into consideration the several causes, contemporaneous, tending to interfere with the business of the Bucki Company, tending to injure their credit or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in the case.

I have therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit.

131 As I say, there was so much uncertainty, that there was no certainty under the law for determining what damages have been suffered by the party in this case.

I therefore instruct you gentlemen that the damage must be confined to the damages suffered by the detention of the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties for the possession of the plaintiff.

To the giving of which instruction to the jury, the plaintiff then and there, and before the jury retired, excepted.

Ground 1st. That the plaintiff had the right to have submitted to the jury, whether or not the direct consequences of levying the writs of attachment prevented the plaintiff from continuing in business.

2nd. That the bringing of the common-law suit on Oct. 1st, 1897, and the refusal of the Atlantic Lumber Company to deliver any more logs did not necessarily prevent the plaintiff from continuing in business.

3rd. That the bringing of the common-law suits, and refusal to deliver logs, were, at best, only causes contributory to the consequences resulting from the attachments, and are inadmissable to def-at (defeat) the plaintiff's right to have submitted to the jury the question whether plaintiff could have continued in business if such attachments had not been issued and levied and damaged caused thereby.

And the testimony being as hereinbefore set forth in the bill of exceptions, the court was requested to instruct the jury as follows, to wit:

If the jury believes from the evidence that if these attachments had not been levied, the plaintiff had, or would have had and owned on October 1st, 1897, sufficient unincumbered property, real and personal, to have enabled it to supply its mill with logs and continue in business, then the fact that one of its drafts went to protest on June 2nd, 1897, and was paid the next day; and the fact that some of its drafts were protested between July 14th, and August 15, 1897, which were paid a few days after such protest, are entirely immaterial in this case upon the subject of its ability to have continued in business after October 1st, if these attachments had not been levied.

The important question is, what was its financial condition October 1st, 1897?

Which instruction the court refused to give, to which refusal the plaintiff then and there, and before the jury retired, except-, on the ground that it embodied a correct principle of law, and was essential to enable the jury to properly apply and give proper effect to the testimony.

And the testimony being as hereinbefore set forth in the
132 bill of exceptions, the court was requested to instruct the jury as follows, to wit:

It is in evidence that on the 6th day of February, 1899, the plaintiff mill properties were sold by the sheriff of Duval county on an execution issued on a judgment in favor of Schwaab for the sum of two thousand dollars, and the properties were purchased by one Henry Weiler. If you believe from the evidence that this sale was one of the direct consequences following these attachments, then the amount of damages should not be reduced because of such sale; in other words, if you believe from the evidence that the plaintiff incurred the indebtedness on which this judgment was recovered after October first, while engaged in a reasonable effort to do business, and that in consequence of such attachment, the plaintiff was not able to pay this debt and continue in business, then you will not diminish the amount of damages you award on the ground that such sale took place.

Which instruction the court refused to give the jury, because there was no evidence which would enable the jury to determine whether the sale was the result of the attachment, or the attendant circumstances. That it may have been *post hoc*, yet not *propter hoc*, to which refusal the plaintiff then and there, and before the jury retired, excepted, on the grounds that such request embodied a correct principle of law upon the facts therein stated, and was essential to enable the jury to properly consider the effect of such facts on the subject of the quantum of damages.

And there was testimony adduced by both parties tending to prove that there *was* numerous difficult questions of law and fact, which the plaintiff's attorneys were obliged to investigate in order to prepare for the trial of the motion to dissolve the attachment, and in the trial of the motion to dissolve the attachments for $75,000, on issues of fact, raised by the traverse affidavits and formal pleadings, and tending to show that said motion was tried before the issues of fact were made upon the merits of the action in which the said attachment was issued; and testimony also tending to establish that the same questions of law and fact that were involved in the trial of the said motion were also involved in the subsequent trial of the said action on the merits.

It was established that the writs of attachment herein were ancillary to two common-law suits; that the court on the motion of the L. Bucki & Son Lumber Company required the Atlantic Lumber Company to file formal pleadings as to the debt or sum demanded in the affidavits for attachments, and that these pleadings were treated as applicable to the common-law actions, as well as the attachment proceedings; that the two suits were consolidated
133 on motion of the Bucki Lumber Company; that afterwards, on motion of the Bucki Lumber Company, and against the protest of the Atlantic Lumber Company, the trial of the common-law action was continued, and a separate trial was given the Bucki Company on the motion to dissolve the attachment, which motion was tried on the issues produced by the formal pleadings. That

the issues arising upon these formal pleadings were substantially made up when this motion to dissolve the attachment was made, and that the common-law actions were subsequently tried on precisely the same issues, except after the attachment was dissolved the L. Bucki & Son Lumber Company put in a plea wherein it pleaded a certain counter-claim by way of recoupment, which it had formerly plead by way of offset.

And JAMES F. C[illegible]EN, a witness for the plaintiff, testified that he was a lawyer by profession and had participated in the conduct of these attachment proceedings in the lower and appellate courts; that with the exception of some objections made to the manner of executing the attachment bonds, and the right to attach for unliquidated damages, and the question of the — of Atlantic Lumber Company to sue out a writ of attachment for the money that fell due October 1st, 1897, the same questions were involved in the disposition of the common-law action as were involved in the attachment proceedings, and that the Bucki Company's attorney, with the exception mentioned, would have been compelled to give the same consideration to these questions in the defense of the common-law action, even though no attachment had been issued. And that, had the common-law action been tried at the same time as the motion to dissolve the attachment was tried, judgment must necessarily have resulted for the L. Bucki & Son Lumber Company in said common-law action on those counts of the declaration on which the attachment was predicated.

And the same witness testified that at the trial of the common-law action on the merits the Atlantic Lumber Co., by its counsel, produced a statement of what it expected to prove to sustain the counts of the declaration upon which the attachment for $75,000 was based, and that such statement embodied substantially the evidence adduced at the trial of the motion to dissolve the attachment, and that the court, after hearing the said statement read, ordered judgment for L. Bucki & Son Lumber Co. upon the counts aforesaid.

And the same witness testified that with the exception of *the exception of* attaching for unliquidated damages every question discussed by counsel for the Bucki Co. in the appellate court applied to the common-law action to the same extent that it applied to the attachment proceedings.

134 And thereupon the plaintiff requested the court to give to the jury the following instructions:

The court further instructs you that the plaintiff had the right to have the motions to dissolve the attachments heard and tried separately from the trial of the merits of the cases of The Atlantic Lumber Company against The L. Bucki & Son Lumber Company, and plaintiff was not obliged to wait until the issues of the merits of said cases had been made up before the said motion was tried; and in answering the questions as to the amount of such attorney's compensation, you will not diminish such amount, because at the trial of the said cases on the merits subsequently had, some of the same

questions of law and fact were involved on the trial of such cases on the merits, as had been previously involved on the trial of the motions to dissolve the attachments; providing you find from the evidence that all the services rendered by such attorneys in preparing for the trial, and on the trial of such motions, were caused and were the direct and proximate consequence of the issuing of such attachment.

And the court refused to give the said instructions, and to the ruling of the court, refusing to give said instructions to the jury, the plaintiff then and there, and before the jury retired, excepted, on the ground that the same embodied correct propositions of law, applicable to the material question in the case.

The court, of its own motion, gave to the jury the following instructions, to wit:

"The defendant in this case was not the original actor in bringing these suits, or suing out these attachments; they gave bond to pay all damages arising out of the improperly suing out of the attachments. A party has a perfect right to sue out an attachment by becoming liable to pay all damages; there is no law against it; it is not a tort; but he becomes responsible to pay all damages from the issuing of the attachment."

And to the giving of said instruction and charge to the jury, the plaintiff then and there, and before the jury retired, excepted, on the ground that it embodied erroneous rules of law, and was calculated to mislead the jury and produce a wrongful impression upon their minds, because suing out an attachment improperly is a tort if the attachment is not sustained.

The court submitted to the jury the question of the amount of reasonable attorneys' fees which the plaintiff was entitled to recover, in the words and figures following, to wit:

In making up your verdict you will find and assess the total amount of damages the plaintiff has sustained, exclusive of reasonable attorneys' fees for services rendered by the plaintiff's attorneys in preparing for and on the trial of the motions to dis-
135 solve the two writs of attachment; and in addition to the amount so found, you will also find and assess separately such sum of money as upon the evidence you believe to be a reasonable compensation for the services rendered by the plaintiff's attorneys in preparing for the trial of and on the trial of the two motions to dissolve the attachments, and in resisting the efforts of the Atlantic Lumber Company to have the judgment dissolving such attachments reversed in the United States circuit court of appeals, and in the Supreme Court of the United States. The court has prepared the form of your verdict as follows:

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

We, the jury, find for the plaintiff and assess its actual damages, exclusive of attorneys' fees at —.

And if the court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of — as a reasonable and just fee for the services proven.

—— ——, *Foreman.*

And the said judge, under the charge, and with the directions aforesaid, submitted the said issues, with the evidence so given on the said trial, to the jury, and the jury aforesaid then and there gave their verdict in the words and figures following, to wit:

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

We, the jury, find for the plaintiff and assess its actual damages, exclusive of attorneys' fees at $10,880.00.

And if the court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500 as a reasonable and just fee for the services proven.

WM. MICKLER, *Foreman.*

136 And thereupon the plaintiff moved the court to enter judgment against the defendant in favor of the plaintiff upon the said verdict for the full amount thereof, including the said sum of seventy-five hundred dollars, found as aforesaid by the said jury as a reasonable and just fee for plaintiff's attorneys for services in obtaining a dissolution of the said attachments.

And afterwards, on plaintiff's said motion for judgment, the court refused to include in the said judgment the said amount of attorneys' fees so found by the jury, to which refusal, the plaintiff then and there excepted, on the ground that the plaintiff had a legal right to have the amount found due for attorneys' fees embraced in the said judgment.

Whereupon, the court aforesaid, on the eighth day of February, A. D. 1900, at the term aforesaid, did render judgment in favor of the said plaintiff and against the said defendant for the sum of ten thousand eight hundred and ninety-five $\frac{4}{100}$ dollars damages and — dollars costs, as appears of record, and inasmuch as the said several matters objected to or insisted upon and considered by the court, do not appear by the record of the verdict and judgment aforesaid, the

said plaintiff, by its counsel aforesaid, did then and there propose this, its bill of exceptions, to the said opinions and decisions of the said judge and request him to sign the same, according to the form of the statute in such case made and provided, which is done this 15th day of March, A. D. 1900.

JAMES W. LOCKE, *Judge.*

(Indorsed:) L. Bucki & Son Lumber Company *vs.* Fidelity and Deposit Company. Plaintiff's bill of exceptions. Filed this 16th day of March, 1900. E. O. Locke, clerk, by Louis Starke, deputy.

Know all men by these presents, that we, Charles Lloyd Bucki, and Horatio Bisbee, are held and firmly bound unto The Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of Maryland, in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made, we do hereby bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Signed and sealed this fifteenth day of March, A. D. 1900.

The condition of the foregoing obligation is such, that whereas, L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, has sued out a writ of error from a judgment of the circuit court of the United States, in and for the southern district of Florida, rendered
137 on the eighth day of February, A. D. 1900, in a certain cause therein lately pending, wherein the said L. Bucki & Son Lumber Company was plaintiff and the said The Fidelity & Deposit Company of Maryland was defendant, returnable to the United States circuit court of appeals on the second day of April, A. D. 1900. Now, if the said L. Bucki & Son Lumber (Company) shall prosecute its said writ of error to effect, and if it fail to make its plea good, shall answer all costs, then this obligation shall be null and void; else to remain in full force and virtue.

CHAS. LLOYD BUCKI. [SEAL.]
HORATIO BISBEE. [SEAL.]

Upon consideration the foregoing bond is approved and writ of error therein executed, mentioned, allowed. In open court this 15th day of March, 1900.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Bond for writ of error. Filed Mar. 15th, 1900. E. O. Locke, clerk.

UNITED STATES OF AMERICA, *ss:*

To the Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, Greeting:

You are hereby cited and admonished to be and appear at a circuit court of appeals of the United States, for the fifth circuit to be holden at New Orleans, Louisiana, on the second day of April, A. D.

1900, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Florida, wherein L. Bucki & Son Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, is plaintiff in error, against said The Fidelity & Deposit Company of Maryland, a corporation as aforesaid, defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned, entered on the eighth day of February, A. D. 1900, should not be corrected, and speedy justice not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this fifteenth day of March, in the year of our Lord, one thousand nine hundred.

JAMES W. LOCKE, *Judge.*

Service of the foregoing citation accepted this 19th day of March, 1900.

R. H. LIGGETT,
Attorney for the Fidelity & Deposit Co. of Maryland.

(Indorsed:) Citation. Filed Mar. 15, 1900. E. O. Locke, clerk.

138 *Clerk's Certificate.*

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

I, Eugene O. Locke, clerk of the above-mentioned court, do hereby certify that the foregoing pages numbered from one to 206, inclusive, constitute a true copy of the record of the judgment, assignment of errors and all of the proceedings in the above-entitled cause, which is of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of above court this 28 day of March, A. D. 1900, at Jacksonville, in said district.

[SEAL.] EUGENE O. LOCKE, *Clerk,*
By LOUIS STARKE, *Deputy.*

139 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1899. May 29, 1900.

(*Extract from Minutes.*)

THE L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND. } No. 925.

This cause was regularly called this day and submitted to the court after argument by Mr. H. Bisbee for plaintiff in error and by Mr. R. H. Liggett for defendant in error.

November Term, 1900. May 28, 1901.

(*Extract from Minutes.*)

THE L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND. } No. 925.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Georgia and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by the court that the judgment of the said circuit court rendered in this cause on the 8th day of February, 1900, in favor of the L. Bucki & Son Lumber Company and against The Fidelity & Deposit Company of Maryland for the sum of ten thousand eight hundred and ninety-five $\frac{4}{100}$ dollars and costs, be, and the same is hereby amended by striking out the words "ten thousand eight" and inserting the words "eighteen thousand three" so that said judgment shall read as follows:

140 "It is therefore considered and so ordered and adjudged that the plaintiff, The L. Bucki & Son Lumber Company, do have and recover of and from the defendant, The Fidelity & Deposit Company of Maryland, the sum of eighteen thousand three hundred and ninety-five $\frac{4}{100}$ dollars ($18,395.04) damages, together with the costs of this cause in this court to be taxed, for all which let execution issue" and as thus amended, said judgment be and the same is hereby affirmed.

It is further ordered and adjudged that the defendant in error, The Fidelity and Deposit Company of Maryland, be condemned to pay the costs of this cause in this court for which execution may be issued out of said circuit court.

141 *Petition for Rehearing.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 925 and 926.

THE L. BUCKI & SON LUMBER COMPANY, Plaintiff in Error,
versus
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant in Error. } No. 925.

and

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
versus
THE L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } No. 926.

Original record filed June 17, 1901.
U. S. circuit court of appeals, filed Jun- 22 1901 J. M. McKee.

142 In the United States Circuit Court of Appeals for the Fifth Circuit.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
versus
THE L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } No. 926.

THE L. BUCKI & SON LUMBER COMPANY, Plaintiff in Error,
versus
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant in Error. } No. 925.

Now comes the Fidelity & Deposit Company of Maryland by its attorney and prays that the court will set aside its judgment hereinbefore entered, and grant the said Fidelity Company a rehearing of the above-entitled causes, which were argued and submitted as one, for the following reasons:

1st. It is respectfully submitted that the measure of damages on an attachment bond is not in any respect regulated by State or local law, but by the common or general law; and the decisions of the Supreme Court of the United States are opposed to the allowance of attorneys' fees as damages in suits upon a bond of the kind of that sued upon.

2nd. The entry of judgment by the appellate court upon the special verdict for $7,500 on account of attorneys' fees, was without authority of law, and deprived the Fidelity Company of its property without due process of law, since by such action of the court the Fidelity Company was deprived of the opportunity to assign errors to the rulings of the circuit court, made in connection with the admission and rejection of evidence upon the subject of attorneys' fees, and thus was denied the right of appeal secured to it by law.

3rd. The Fidelity Company reserved various exceptions to the ruling of the circuit court on the admission and rejection of evi-
143 dence on the subject of attorneys' fees, and the entry of judgment upon the special verdict by the appellate court deprived the Fidelity Company of the opportunity to have such rulings reviewed, because of the fact that the judgment on the special verdict having been for the Fidelity Company in the court below, it was not in a position to reserve a bill of exceptions presenting such objections, and had no opportunity to take a writ of error, so as to present such exceptions to this court.

4th. The entry of judgment by the appellate court on the special verdict, would only have been justified in case the circuit court committed no errors against the Fidelity Company in the admission and rejection of evidence touching the subject of attorneys' fees, and as the appellate court could not know that such was the fact, it should not have entered judgment upon such special verdict, and the effect of such action was to deprive the Fidelity Company of the right to review any errors which the circuit judge might have made in the

admission or rejection of evidence in connection with the matter of attorneys' fees.

The statutory right of the Fidelity Company to have the rulings of the circuit judge in connection with the admission or rejection of evidence on the subject of attorneys' fees, reviewed, can only be secured to it by a reversal of the final judgment entered in this case, and by sending this case back to the circuit court with instructions to award a new trial.

5th. This honorable court appears to have overlooked the Fidelity Company's 14th assignment of error, (No. 926—page 35, 13th exception, page 49), which relates to the action of the circuit court in permitting the Bucki Company to prove as an element of damages, that it employed four watchmen to watch the mill property during the time of the lien of the attachment, a period of about one year, it being the universal rule that no such damages can be recovered.

6th. This honorable court appears to have overlooked the 15th assignment of error, (No. 926, page 36, and 14th exception, page 49), which relates to the action of the court in refusing to permit the Fidelity Company to prove that the Bucki Company sold its lumber, and made use of the money immediately upon its receipt, and at the same time in effect instructing the jury, that, in contemplation of law, the Bucki Company actually held the proceeds of such lumber for the indemnity of its surety upon the forthcoming bond, and that the Bucki Company would be entitled to recover from the Fidelity Company all damages sustained by reason of the loss of the use of such funds.

In this connection the court is further referred to page 70
144 of the record in 926, where the following charge of the court is to be found:

"After giving the forthcoming bond for the personal property, to wit: the logs and lumber levied upon, the plaintiff held such property as bailee for the sheriff, and was bound to deliver such property back into the sheriff's possession, whenever said sheriff demanded said property for the purpose of selling the same to satisfy any judgment that the court might render in the attachment suit. If the plaintiff sold such personal property, after giving such forthcoming bond, in contemplation of law, the plaintiff held the proceeds of such sales in its hands, and has the legal right to hold such proceeds in its hands, to pay any judgment that may hereafter be recovered against it in the suit in which the attachments were issued, until the lien of such attachments ceases to exist."

The result was that the jury were at liberty to presume that the Bucki Company had sustained serious damages by reason of retaining possession of the proceeds of the sale of the lumber, notwithstanding the fact that the Fidelity Company had been denied the right to prove that the Bucki Company had used the proceeds of such lumber in the ordinary course of business, since received.

It is respectfully submitted that the judgment of this honorable court should be set aside, and a rehearing of this cause awarded.

R. H. LIGGETT,

Attorney for the Fidelity & Deposit Company of Maryland.

Certificate.

This is to certify that in my opinion the foregoing petition for a rehearing is well founded, and that a rehearing should be allowed the Fidelity & Deposit Company of Maryland in this cause.

R. H. LIGGETT,
Counsel for the Fidelity & Deposit Company of Maryland.

145 November Term, 1901. November 26, 1901.

(*Extract from Minutes.*)

L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND. } No. 925.

Ordered that the petition for rehearing filed in this cause be and the same is hereby denied.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Error,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant in Error. } No. 925.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } No. 926.

Error to the United States circuit court for the southern district of Florida.

Before Pardee, McCormick, and Shelby, circuit judges.

McCORMICK, circuit judge, delivered the opinion of the court.

146 The proceedings to review which these writs of error were sued out were had in an action brought by the L. Bucki & Son Lumber Company against the Fidelity & Deposit Company of Maryland on two attachment bonds given in two actions brought by the Atlantic Lumber Company on October 1, 1897, on which bonds the Fidelity & Deposit Company of Maryland bound itself as surety. The cases in which the bonds were given are sufficiently stated in the decisions of this court as reported in 92 Fed. 865–867, and 93 Fed. 765, 766. The purpose of this action on the bonds is to recover all costs and damages sustained by the plaintiff therein in consequence of the improper suing out of the writs of attachment in the cases in which the bonds were given, according to the condition of the bonds and of the statute requiring them. This

action was brought in the State court and removed to the United States circuit court by the defendant. The declaration consists of two counts. Each of these counts respectively sets forth the affidavit upon which the writ was issued, the bond, the writ, and a description of the property levied on, and alleges that for several years prior to, and on the day the writs were levied, the plaintiff had been engaged in doing, and was then engaged in doing, a prosperous business of manufacturing and selling hard-pine timber and lumber; that the daily product of its mill was about one hundred thousand feet; that the interruption, suspension and destruction of its business and credit, in consequence of the attachments, and the costs, attorneys' fees and expenses incurred in preparing for and on the trial of the motions to dissolve the attachments, and other damages occasioned thereby, had damaged the plaintiff in stated large amounts, and that the damages sustained had not been paid. The defendant filed numerous pleas, all of which were disposed of on demurrer, except the plea of *non-damnificatus*, and the issues raised by that plea were the only issues of fact raised by the jury. Among these issues of fact the court submitted to the jury the question of the amount of the reasonable attorneys' fees which the plaintiff was entitled to recover, in words and figures following, to wit:

"In making up your verdict you will find and assess the total amount of damages the plaintiff has sustained, exclusive of reasonable attorneys' fees for services rendered by the plaintiff's attorneys in preparing for and on the trial of the motions to dissolve the two writs of attachment; and in addition to the amount so found, you will also find and assess separately such sum of money as
147 upon the evidence you believe to be a reasonable compensation for the services rendered by the plaintiff's attorneys in preparing for the trial, and on the trial, of the two motions to dissolve the attachments, and in resisting the efforts of the Atlantic Lumber Company to have the judgment dissolving such attachments reversed in the United States circuit court of appeals and in the Supreme Court of the United States. The court has prepared the form of your verdict as follows:

'We, the jury, find for the plaintiff and assess its actual damages, exclusive of attorneys' fees, at —

'And if the court be of the opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of — as a reasonable and just fee for the services proven.'"

Under the foregoing instruction, and other instructions which the court gave, the jury returned a verdict for the plaintiff assessing its actual damages, exclusive of attorneys' fees, at $10,880. And as to the attorneys' fees the verdict proceeds in these words: "And if the court be of the opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500 as a reasonable and just fee for the services proven." On the return of this verdict the plaintiff moved the court to enter judgment in its favor against the defendant for the full amount thereof, including the sum of $7,500 as attorneys' fees for

services in obtaining a dissolution of the attachments. After due consideration of the matter, the circuit court refused to enter judgment on the verdict for $7,500 attorneys' fees, and rendered its judgment in favor of the plaintiff and against the defendant for the sum of $10,895.04 damages, and for costs.

Each of the parties sued out a writ of error. Thirty-seven errors are assigned by the L. Bucki & Son Lumber Company on its writ of error, and thirty-nine by the Fidelity & Deposit Company on its writ of error. The respective assignments together fill twenty-seven pages of the printed records. Of these numerous errors thus elaborately assigned we deem it necessary to notice only one (the 35th), assigned by the Bucki Company. It is stated in these words:

"The court erred in excluding from the judgment the sum of $7,500 which the jury found specially in their verdict, as a reasonable compensation for plaintiff's attorneys for services rendered on the trial of and preparing for the trial of the motion to dis-
148 solve the attachment. This was error on the following grounds, to wit:

(1.) Because the amount of reasonable attorneys' fees was an element of damages sustained by the attachments.

(2.) Because it was a question of local law, arising upon a statute of Florida authorizing the issue of attachments, and providing the condition of the bond upon which attachments can issue.

(3.) Because the supreme court of Florida had previously decided that reasonable attorneys' fees on such a motion are proper elements of damages, and such decisions of the supreme court of Florida were obligatory upon the Federal court."

The statute of Florida which required the giving of the bond on which these actions are based fixes the condition of the bond as follows: "conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment." Rev. Stats. Fla. 1892, sec. 1646.

The plaintiff in the attachments claimed in the aggregate, and in round numbers, the sum of $85,000, and the writs were so levied as, for a time at least, to stop the operations of a saw-mill plant with a capacity of about one hundred thousand feet of sawed timber and lumber per day. The most vital feature of the levy was the placing of it on the accumulation of logs held on hand to meet the daily consumption of the mill. Of the gravest effect, but somewhat less than that of the levy on the logs, was the levy on the stock of sawed timber and lumber manufactured to meet current contracts. And a very serious effect on the business of the defendant in attachment was the levy of the writs (for so large a claimed indebtedness) on the real estate, including as it did the land and fixtures constituting the saw-mill plant. The harshness of the use of the extraordinary process of attachment is recognized by the statutes of Florida, which provide that the court to which an attachment is returnable shall always be open for the purpose of hearing and deciding motions to dissolve it. Rev. Stats. Fla. 1892, sec. 1656. When an attachment is run on property necessary for the conduct of a going business which the levy of the attachment for the time being destroys or sus-

pends, or seriously impedes, nothing can be more natural and urgent from a business point of view than the moving by the defendant in attachment for its dissolution. Such a motion so urgent and
149 essential requires for its conduct the services of an attorney of ability and skill, whose reasonable compensation will be proportioned to the interests and questions involved. There could hardly be a more direct consequence of the levy of such a writ than this; and we concur in the earnest suggestion of the counsel for the plaintiff in error that the reasonable compensation to the attorney for presenting and conducting such a motion is as direct a consequence of the levy of the writ as is the cost of the filing of the motion to dissolve it.

It is stated by counsel that the learned judge who presided at the trial announced that the case of Oelrichs *vs.* Spain, 15 Wall. 211, should be followed. That case has some historic interest on account of the subject-matter of the original bill and the prominence of several of the actors in the transactions out of which the litigation grew. The immediate case was a suit in equity on a bond or bonds given to procure an injunction which restrained the defendant in the injunction proceedings from drawing money from the Federal Treasury until the further order of the court. In the case in which the bonds were given no motion was made to dissolve the injunction, and no professional services were rendered in obtaining its dissolution distinct from the services required in the conduct of the proceedings to the hearing and on the hearing of the bill on the merits. The writ was never dissolved until and except by the final decree. The payees in the bonds were largely successful on the merits.

Counsel for the defendant in error in his brief makes this statement: "In fifteen States and the Territory of New Mexico, attorneys' fees are recoverable on attachment bonds, but in six of those, namely, Louisiana, Kentucky, Ohio, Illinois, Minnesota, and New York, they are not recoverable when the defense of the attachment proceedings involved the merits. In two of the States mentioned, namely, Washington and Iowa, the recovery of attorneys' fees on attachment bonds *are* expressly provided for by statute, and the same may be true of some of the others." Counsel for the plaintiff in error in his brief states: "An examination of the text books and digests of decisions will, we believe, establish that in thirty-eight States of the Union such fees are held a proper element of damages. In the other States the question is controlled by statute, or by antiquated views of public policy." The plaintiff in error contends that in this case it is a question of local law; that it arises from the State statute, and could never have arisen if the statute had not required such a bond to be given.

150 In the matter of injunctions to stay proceedings at law the Florida statute provides that if the application be to stay the proceedings before verdict or inquest of damages, the applicant must enter into bond conditioned "to pay to the plaintiff all damages, losses, expenses, and charges which he may have sustained or have been put to by reason of the issuing of the injunction if the injunction shall be dissolved, or the bill upon which it was granted be dis

missed;" or if the application be to stay the proceedings after verdict or inquest of damages, "to pay the debt, interest enjoined and such damages as may be occasioned by the wrongful issuing of the injunction if the injunction be dissolved, or the bill upon which it was granted be dismissed."

In Wittich *vs.* O'Neal, 22 Fla. 592, the condition of the bond sued on was that if the obligors "shall pay to W. L. Wittich all damages he may sustain by the issuing of the injunction in case the injunction be hereafter dissolved, then this obligation to be void." On that bond an injunction had been issued in a suit pending at the time of the execution of the bond between the surviving partners of the firm of Keyser, Judah & Co. and W. L. Wittich. This injunction was dissolved by the judge of the court on the application of Wittich on the 6th of April, 1881, and a final decree dismissing the bill was rendered on the 9th of April, 1885. In a suit on the bond given to obtain the temporary injunction the question arose, and was fully considered, "are counsel fees, incurred to dissolve the injunction, damages that may be recovered?" On that question the supreme court of Florida said: "If the plaintiff was compelled to employ counsel to dissolve the temporary injunction, it is clear that he was damaged to that extent, and the question above mentioned arises as to whether such damages are recoverable or not." The opinion then proceeds to cite, with emphatic approval, the case of Ah Thaie *vs.* Quan Wan & Kan Se, 3 Cal. 216, in which case the California court cited and followed the decision of Chancellor Walworth in Edwards *vs.* Bodine, 11 Paige Ch. Repts. 224, 225. And the Florida court further say that the same principle has been upheld in the following cases: Darby Bank *vs.* Heath, 25 N. H. 524; Collins *vs.* Sinclair, 51 Ill. 328; Behrens *vs.* McKenzie, 23 Io. 341; Reece *vs.* Northway, 58 Io. 187; Brown *vs.* Jones, 5 Nev. 374, 377; Livingston *vs.* Exhum, 19 S. C. 223, 229. And add: "Many other cases might be cited to the same effect." After referring to Oelrichs *vs.* Spain, and quoting extensively the language of an opinion in that case on the sub-
151 ject, the court refers to Oliphant *vs.* Mansfield, 36 Ark. 191, and Wood *vs.* State, a then recent case from the court of appeals of Maryland (announced July 15, 1886), and say that these cases are based on Oelrichs *vs.* Spain, and contain no argument or reasoning that is not found in that case; and conclude their opinion on this subject in these words: "Against such an array and weight of authority as sustain the conclusion of the court, as expressed in 3 California, 216, in favor of the principle that attorney fees are recoverable in a suit on an injunction bond, we are loth to follow the few authorities that hold the contrary, in the absence of some controlling argument or reason that would convince our judgments of the correctness of these conclusions. The reasons set forth in Oelrichs *vs.* Spain are to our minds not satisfactory, and we think are fully answered in the brief of counsel for appellant."

The case of Gonzales *vs.* Tobacco Co., 26 South, 1012, was a writ of error taken from a judgment of the circuit court of Duval county, Florida, rendered by a referee in an action at law to recover dam-

ages upon an attachment bond executed by Gonzales and two sureties, payable to the tobacco company, conditioned in accordance with the requirements of the statute, to well and truly pay all costs and damages the defendant may sustain in consequence of improperly suing out a certain attachment against the goods and chattels of defendant in error by Gonzales. The declaration alleged the giving of the bond, the condition thereof; that the attachment was shown and proven to have been improperly sued out by the result of a trial had May 25, 1892, when Gonzales had to dismiss, and did dismiss, his suit on which the attachment was drafted, and with which it was connected, a part and parcel thereof; and claimed as damages sustained in consequence of improperly suing out the attachment, among other things, certain sums for attorneys' fees and costs and expenses incurred by defendant in error. Gonzales filed a plea in offset, alleging that the plaintiff was, before and at the time of the commencement of the suit, indebted to him in the sum of $562, together with interest thereon from June 30, 1891, "as follows," giving particulars. A demurrer to this plea was sustained. Other pleas were subsequently filed upon which issue was joined, one of which alleged that the attachment proceeding in which the bond sued upon was given was ancillary to a suit in assumpsit; that no trial was had as to the sufficiency of the attachment proceeding, but that all proceedings, attorneys' fees, costs of court, fees of witnesses, etc., alleged in the declaration were had and incurred in and about the defense of the suit in assumpsit as to which the attachment was ancillary. The record did not show whether the principal suit was begun by the attachment, or whether the latter was sued out after the institution of the former. The writ was levied upon certain personal property belonging to the defendant in attachment, which remained in the hands of the officer for about ten months, when, on motion of Gonzales, the plaintiff in the suit, the principal suit was dismissed at his cost, with an order to the officer to deliver the attached property to the defendant in attachment. From the evidence it appeared that a motion to dissolve the attachment had been filed, but the grounds of this motion were not stated, nor did it appear that any expenses or attorneys' fees were incurred in relation thereto. It did appear that the attachment was *ipso facto* dissolved by the dismissal of the principal suit, and that the dismissal of the latter was a voluntary act upon the part of the plaintiff in the suit. The referee found that the measure of damages to be recovered by the defendant in attachment was the interest on the value of the goods for the time they were in the custody of the sheriff (the goods not being materially damaged), and costs and expenses, including attorneys' fees, of procuring a release of the property from the attachment. Several grounds of error were assigned, but the court did not deem it necessary to pass upon any of them except those relating to the rulings upon the demurrer to the plea of set-off and the motion for a new trial. As to the first it held that the set-off was not well pleaded. As to the second the court said: "The motion for a new trial ought to have been granted. The only evidence relative to damages claimed on account of costs,

152

expenses, and attorneys' fees, was the testimony of T. F. McGourin, a witness for defendant in error, (the tobacco company). Upon his direct examination he was asked if the defendant in error had been to any cost and expense in direct consequence of the attachment and seizure of the goods. He replied affirmatively, and gave in detail the following items: 'Attorneys' fees, $80; six depositions, at $5 each, $30; six witnesses, at $1.25 each, $7.50; Wolfe's expenses, $22; McGourin's expenses, $44; total, $183.50.' On cross-examination this witness stated that the 'attorneys' fees were paid in defense of the main case;' that the depo-
153 sitions were taken to cover testimony that was intended to be used at the hearing of the main case; 'that the expenses of Mr. Wolfe were incurred for his presence here (in Jacksonville) at the time of the main trial;' that 'those expenses were incurred at the time that the case was tried in which Mr. Gonzales was complainant and the De Funiak Tobacco Company was defendant, in which Mr. Gonzales claimed that an amount was due him on salary.' In answer to the question, 'this dismissal of the case was dated May 25, 1892; were any of these costs incurred about that time?' He said, 'Yes, sir, I think they were all about that time. I think they were incurred by reason of that suit.' Although this witness stated upon direct examination, in a general way, that these fees and expenses were incurred in direct consequence of the attachment of the goods, his cross-examination explained what he meant by that statement, and developed the fact that they were all incurred in defence of the main suit, and not in any proceeding to test the propriety or procure the dissolution of the attachment, thereby fully establishing the truth of one of the pleas then in issue before the referee. There was nothing to contradict the testimony of this witness, and consequently no evidence upon which the referee could properly base a finding for these items. As his finding and judgment clearly embraces them, the motion for a new trial was well taken. The condition of the bond is to 'pay all costs and damages the defendant may sustain in consequence of improperly suing out said attachment,' and this language will not admit of damages for expenses of defending the main suit. By the great weight of authority, while attorneys' fees and other expenses incurred in relation to the attachment or in relation to procuring its dissolution will be allowed as damages in actions upon attachment bonds, the fees and expenses incurred in defending the principal suit cannot be allowed, in the absence of statute or a stipulation in the bond to that effect. Wittich *vs.* O'Neal, 22 Fla. 592; Drake, Attachm., sec. 176; Sadler *vs.* Bean, 38 Io. 684; Frost *vs.* Jordan, 37 Minn. 544; Alexander *vs.* Jacoby, 23 Ohio St. 358; Bank *vs.* Wylie, 52 Hun. 146, 4 N. Y. Supp. 907; Damron *vs.* Sweetser, 16 Ill. App. 339. * * * The judgment is reversed, and a new trial granted."

Referring to this case the distinguished counsel for the defendant in error says: "It appears from the decision that no motion to dissolve the attachment was made, and that it was only dissolved as a result of a judgment for the defendant in the main action to
154 which the attachment was ancillary, and it was on this ground that a right to recover the fees was denied." After quoting

the closing paragraph of the foregoing excerpt from the opinion, the able counsel says: "It will be observed that the court viewed the subject of the allowance of attorneys' fees as damages as a question of general jurisprudence, and as one that is to be construed by the rules of decision of the common law, and in this way the case affords light on the subject, and in this way only, for the question now under consideration was not before the court, and what was said on the subject was merely an expression of opinion as to the weight of authority." The language just quoted suggests in a delicate and politic way that the question we are considering was not before the court, and that what was said on that subject was mere dictum. Section 1327 of the Revised Statutes of Florida provides that the judge of the supreme court of this State delivering the opinion of the court shall prepare and make a syllabus or statement of the points and principles intended to be decided by the court, which shall be filed with the opinion, and published in the reports at the beginning of the opinion, in lieu of that usually prepared by the reporter. In the report of this case the second paragraph of the syllabus is as follows: "2. Attorneys' fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in an action upon attachment bonds; but fees and expenses incurred in defending the principal suit cannot be allowed, in the absence of statute or a stipulation in the bond to that effect. (Syllabus by the court)."

We do not overlook the case of Hart *vs.* Stribling, 25 Fla. 435, in the report of which we find this in the syllabus: "1. Under the statute the judges of the supreme court of this State are required, in deciding cases, to prepare and make a syllabus of the points and principles intended to be decided by the court, which shall be published in the reports, in lieu of that usually prepared by the reporter. But where a judge who writes the opinion of the court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point or principle is *obiter dictum*, and it is binding on no one."

Perhaps an exhaustive practical judicial definition of the much-used and abused term "dictum" cannot be evolved from reported decisions of approved authority. But accepting the definition expressed in the quotation just made from the syllabus in
155 Hart *vs.* Stribling as sufficient for our present discussion, we submit that it cannot fairly be contended that the judge who wrote the opinion of the court in Gonzales *vs.* Tobacco Company, and who in obedience to the requirement of the statute prepared the syllabus of the principles intended to be decided by the court in that case, expressed a view upon any point or principle which he was not required to decide. The allegation in the declaration was sufficient to admit proof of fees paid to an attorney for his services in connection with the attachment and its dissolution, as distinguished from his services in connection with the action of assumpsit on which the attachment was grafted. And this allegation is aided

by the plea of the defendant that the attachment was ancillary to a suit in assumpsit; that no trial was had as to the sufficiency of the attachment proceeding; and that all proceedings, costs of court, fees of witnesses, etc., alleged in the declaration were had and incurred in and about the defense of the suit in assumpsit to which the attachment was ancillary. The opinion puts emphasis on the fact that the only evidence relative to damages claimed on account of costs, expenses, and attorneys' fees was the testimony of one witness for the defendant in error; and in another place says: "There was nothing to contradict the testimony of this witness, and consequently no evidence upon which the referee could properly base a finding for these items. It does, however, clearly appear from the testimony of this one witness, and that, too, on his cross-examination, that there was a main trial of the case, and that this main trial took place, or at least terminated, on May 25, 1892, as alleged in the declaration." It is also clear, from the opinion, that this issue as to attorneys' fees being a proper element of damages in the case was the very one on which the court decided to reverse the judgment and to grant a new trial. Preparatory to the new trial the complainant, if he was so advised, could amend his declaration, and on the new trial additional testimony to that of the one witness examined on the first trial might be offered and admitted. It was therefore incumbent on the court to discuss this issue in the manner in which it did, and to announce the proper rule to be applied by the trial court on a second trial of the case. If the language of the opinion, and of the syllabus on that subject, is dictum, it is dictum of the highest grade, and of a grade so high that the line between it and authoritative decision is too shadowy to be discerned by average judicial acumen.

156 "Attachment is essentially a creature of the written law. Hence, but little assistance can be obtained in discussing this peculiar remedy by looking beyond the statute by which it is authorized. The force and effect of attachment laws can only be tested by the principles of statutory construction." 1 Wade, Attachm., sec. 2.

"The natural result of the matters thus briefly noticed is, to give this remedy a high practical importance, and to lead to a voluminous mass of judicial decisions, extending over a wider surface, and bringing into view a greater variety of legal doctrines, than would be conjectured by those who have not examined the subject. In relation to it there can, in the nature of our institutions, be no uniform system of statute law; but notwithstanding the inevitable diversity in this particular, there is a general unity of aim and result; so that principles and rules of identical import may be—and in numberless instances are—judicially established under statutes widely differing in details. Indeed, it may be questioned whether there is any other subject of equal extent in the administration of the law depending so entirely upon, and so exclusively regulated by statutory provisions, that would exhibit less diversity

of judicial decision than is connected with this." Drake, Attachm., sec. 8 (5th ed.)

"Questions of public policy, as affecting the liability for acts done, or upon contracts made and to be performed, within one of the States of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the State, as expressed in its own constitution and statutes, or declared by its highest court." Insurance Company *vs.* Railway Company, 175 U. S. 100.

"In its nature this remedy is certainly anomalous. As it exists under the custom of London, it has hardly any feature of a common-law proceeding. * * * In these (just mentioned) and other respects the proceeding under the custom has an individuality entirely foreign to the common law. Its peculiar features have in the main been preserved in its more enlarged and diversified development in this country." Drake, Attachm., sec. 4.

It has not been suggested, and cannot well be, that the questions we are discussing are controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial
157 or mercantile law or of general jurisprudence, of national or universal application; and hence they are governed by the law of the State as expressed in its own constitution and statutes, or declared by its highest court.

We therefore conclude that the judge of the circuit court erred in refusing to give judgment on that part of the verdict of the jury which reads: "And if the court be of the opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500 as a reasonable and just fee for the services proven;" and that the judgment, instead of being for only the sum of ten thousand, eight hundred and ninety-five and four one-hundredths dollars, should have been for the sum of eighteen thousand, three hundred and ninety-five and four one-hundre-ths dollars. In which respect, and to which extent, we now amend the judgment of the circuit court by striking out the words "ten thousand eight" and inserting the words "eighteen thousand three."

These two writs of error were submitted together and argued together before us nearly a year ago (May 29, 1900), since which time we have held them under examination and advisement, and have given the numerous assignments of error careful and diligent consideration. We find that the action of the learned judge who presided at the trial in the circuit court is in several particulars subject to the criticism which is leveled at it by some of the other numerous assignments of error made by the plaintiffs in error on their respective writs; but on the fullest consideration of the whole case, we conclude that the record presents no error on the part of the trial judge for which the judgment should be reversed, except the error that we have discussed, and its nature is such that we can and do correct it by

amending the judgment as above indicated. And thus disposing of both writs of error, the judgment of the circuit court is affirmed.

Endorsed: Filed May 28, 1901. J. M. McKee, clerk.

158 United States Circuit Court of Appeals for the Fifth Circuit, November Term, 1900.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Error,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant in Error. } No. 925.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } No. 926.

Errors to the circuit court of the United States for the southern district of Florida.

Before Pardee, McCormick, and Shelby, circuit judges.

Mr. H. Bisbee for plaintiff in error in No. 925 and for defendant in error in No. 926.

Mr. R. H. Liggett for defendant in error in No. 925 and for plaintiff in error in No. 926.

SHELBY, circuit judge, dissenting:

This action was brought by the L. Bucki & Son Lumber Company, a corporation under the laws of New Jersey, against the Fidelity & Deposit Company of Maryland, a corporation under the laws of Maryland, to recover damages upon two attachment bonds executed by the latter company as surety.

159 For brevity the former company will be called the "Bucki Company," and the latter the "Fidelity Company."

A brief statement of the facts which led to and are involved in the litigation will be necessary: On the first day of October, 1897, the Atlantic Lumber Company sued out a writ of attachment for $9,980.80 and caused it to be levied on the lumber of the Bucki Company, consisting of about one million two hundred and fifty thousand feet. On the same date the Atlantic Lumber Company sued out another writ of attachment against the Bucki Company for $75,000 and caused it to be levied upon about three million five hundred thousand feet of timber and lumber and three million feet of logs in a boom and on the saw-mill plant of the Bucki Company. The sheriff took possession of the personal property levied on. On the 11th day of October, 1897, the Bucki Company, by executing a

forthcoming bond in accordance with section 1652 of the Revised Statutes of Florida, obtained possession of part of the personal property levied on, and on the 4th day of November, 1897, by the execution of a similar forthcoming bond, the Bucki Company obtained possession of the remainder of the personal property levied on. The sheriff held the logs and lumber levied on from October 1, to October 11, 1897. The mill was run from October 11, to about November 16, 1897, during which time all of the logs were cut into timber and lumber, amounting to about three million six hundred thousand feet. The Bucki Company did not operate the mill after November 16, 1897. On motion of the Bucki Company the attachments were both dissolved, and the result of the litigation in the attachment suits showed that they were improperly issued.

Under the laws of Florida no attachments shall issue until the person applying for the same shall enter into bond with sureties, payable to the defendant in at least double the debt or sum demanded, conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out the attachment. Revised Statutes of Florida, sec. 1646. The bonds sued on in this action were given under that statute. The Fidelity Company is a surety on each of the bonds. Each bond has the condition prescribed by the statute "to pay all costs and damages" which the Bucki Company may sustain in consequence of it, the said Atlantic Lumber Company, "improperly suing out said attachment." The declaration recited the proceedings in the
160 attachment cases, setting out the bonds and writs and levies, and claimed damages for the interruption, suspension, and destruction to the Bucki Company's business and credit in consequence of such attachments, and also claimed costs and attorneys' fees and expenses incurred in preparing for and on the trial of the motions to dissolve the attachments.

The case went to trial on the plea of *non damnificatus*, and much evidence was offered relating to the operations of the mill, the amount of lumber sawed, the amount sold, the prices received, and the profits made. Evidence was also offered as to the effect of the attachments upon the credit of the Bucki Company and on the question as to whether its credit was good or bad prior to the attachments. Evidence was also offered as to reasonable attorney fees for procuring the dissolution of the attachment. The Bucki Company requested the court to charge the jury that it was entitled in this action to recover for the injury to credit and loss of profits in its business. These requests were made in sixteen separate charges, which were refused by the court, and the refusal of each is here assigned as error. Two of the requested charges presenting the questions are selected: (1.) "It is a question of fact for you to determine whether or not if these attachments had not been issued and levied, the plaintiff would have been able to supply its mill with logs and continued in its business and the amount of profits it would have made in such business in case said attachments had not been issued, provided you believe from the evidence that the direct consequences

of such attachment caused the plaintiff to cease continuing in business and that plaintiff would have and could have continued in business if such attachments had not been issued and levied and continued upon plaintiff's properties." (2.) "If you believe from the evidence that the issuing and levying of these writs of attachment injured or impaired the credit or financial standing of the plaintiff as it existed on October 1st, 1897, then the plaintiff is entitled to recover such damages for injury to its credit as you find from the evidence the plaintiff sustained as a direct consequence of the issuing and levying of such writs upon the properties of the plaintiff."

The evidence tended to show that $7,500 would be a reasonable compensation for the attorney for procuring the dissolution of the attachments. The court refused to permit the attorney's fees to be estimated as a part of the damages, and the Bucki Company reserved an exception.

There are other assignments of error by the Bucki Company,
161 but those that are material raise questions that are involved in the assignments stated. The Fidelity Company also reserved a bill of exceptions. It assigns that the court erred in giving a number of charges relating to the business of the Bucki Company and its interruption by attachment. Two of those charges may be selected as presenting the questions involved: (1.) "Another element of damages claimed by the plaintiff is that the attachment interrupted its business and by such interruptions and the consequences thereof, resulting from the attachments, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff agreed to furnish prior to October 1st, 1897; that such losses consist of certain amounts the purchasers of the lumber had to pay to supply what they had purchased of plaintiff. The court instructs you that the defendant is liable for all such losses if any resulted as a direct consequence of the two attachments." (2.) "You are the exclusive judges as to the facts of this cause, you are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequence of the issuing and levying of these writs of attachment. These damages consist of two general consequences: 1st. All moneys paid out and all expenses incurred in and about and attending to the preparation of the trial of the motions to dissolve the attachments and on the trial of such motions which become reasonably necessary as a direct consequence of such attachment. 2nd. All consequential damages, that is, all damages caused by the interruption of the plaintiff's business, either by disabling the plaintiff from operating its mill or disabling it to deliver timber and lumber it had agreed to deliver prior to October 1st, 1897, if you believe from the evidence that the direct and proximate effect of such attachments caused such interruption of the plaintiff's business." It is assigned here by the Fidelity Company that the court erred in giving the first charge above stated and in giving the second part of the second charge above stated. There was a verdict and judgment for the

Bucki Company against the Fidelity Company for $10,880, damages, exclusive of attorneys' fees, and each party sued out a writ of error.

1. The question as to attorneys' fees will be first considered.

In addition to the general verdict for the plaintiff, the jury found a special verdict as to the amount of attorneys' fees. They
162 found that $7,500 would be reasonable and just as attorneys' fees for the services rendered in procuring the dissolution of the attachments. The circuit court held that no judgment should be entered on this part of the verdict. The condition of the bond sued on is to pay "all costs and damages" which the defendant in the attachment suit may sustain in consequence of the attachment being improperly sued out. The word "costs" as used in the bond refers, I think, to such costs as the defendant would have the right to have taxed in his favor in the attachment proceedings. The word refers to such sums as are prescribed by law as charges for the services enumerated in the fee bill or bill of costs. The word "damages" means such damages as are legally recoverable. The question here is, of course, whether attorneys' fees paid in securing the dissolution of the attachment constitute such damages.

As early as 1796 a case came before the Supreme Court of the United States that involved the question as to whether counsel fees should be allowed as a part of the damages. The case is very briefly reported, and its nature does not fully appear. It does appear, however, that in estimating the damages the court below had allowed a charge of $1,600 for counsel fees, and the Supreme Court said that this ought not to be allowed. The general practice, the court said, in the United States is in opposition to it; and the court added that even if that practice were not strictly correct in principle, it is entitled to the respect of the court until it is changed or modified by statute. *Arcambel vs. Wiseman*, 3 Dall. 306.

In *Day vs. Woodworth*, 13 How. 363, it was held that counsel fees ought not to be included in and allowed as damages in any action at law. In this case the court called attention to the fact that the courts of common law should have an established system of costs which are allowed to the successful party by way of amends for his expense and trouble in prosecuting his suit, and that the taxed costs are often far below the real expenses incurred by the litigant; and yet, the court added, it is all the law allows as *expensa litis*.

Flanders vs. Tweed, 15 Wall. 450, was an action to recover damages caused by the alleged unlawful seizure and detention of cotton. In the itemized statement of damages found by the jury, and allowed by the circuit court, was an item of $6,000 allowed as lawyers' fees. The Supreme Court held that the judgment should be reversed and modified by disallowing this sum. See also *Pacific Ins. Co. vs. Conard*, 1 Baldwin, 138; Fed. Cas. No. 10,647.

In *The Nuestra Senora de Regla*, 17 Wall. 29, counsel fees for
163 $5,000 for defending against the illegal seizure and detention of a vessel were allowed by the lower court. The Supreme Court held "the allowance of counsel fees wholly unwarranted."

The case of *Bing Gee vs. Ah Jim*, 7 Fed. Rep. 811, was a suit on an

attachment bond. In that case the allegations concerning the expenses incurred in the employment of attorneys were, on motion of the defendants, stricken out of the complaint as immaterial.

The case of *Jacobus vs. Monongahela Nat. Bank of Brownsville*, 35 Fed. Rep. 395, was a suit for damages for wrongfully suing out an attachment. The court held, Judge Acheson delivering the opinion, that the plaintiff could not recover counsel fees paid in the attachment suit. This question, the court said, under the decisions of the Supreme Court of the United States must be answered negatively, and some of the cases are cited to which we have already referred.

It is true that in *Sonneborn vs. A. T. Stewart & Co.*, 2 Wood, 599, which was a suit for the malicious prosecution of a proceeding to have the plaintiff declared a bankrupt, Mr. Justice Bradley charged the jury that the plaintiff could recover his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy. That case, however, was carried on writ of error to the Supreme Court of the United States and there reversed. Counsel representing the plaintiff in error, as shown by the brief, argued that the fees expended by the plaintiff in prosecuting or defending his case could not be allowed as any part of the damages. The Supreme Court said: "The fees of counsel in prosecuting this case were no part of the consequences naturally resulting from the action of the defendants in suing out the decree and warrant in bankruptcy. They were not what the defendants ought to have foreseen. That such fees are not recoverable, and why they are not, was clearly shown in *Good vs. Mylin*, 8 Penn. St. 51." Mr. Justice Bradley, who had presided on the trial in the lower court, dissented from the opinion of the court, remarking that the exception in regard to allowing fees in the suit by way of damages was not founded in truth. The court below, he said, expressly confined the jury to three specific grounds of damage, and this was not one of them. *Stewart vs. Sonneborn*, 98 U. S. 187, 197.

The case of *Oelrichs vs. Spain*, 15 Wall. 211, is considered a leading case on this question. It involves the question of the
164 assessment of damages upon the dissolution of an injunction. It was claimed that the enjoined party was entitled to include as damages the counsel fees paid in consequence of an injunction. The court commented on *Arcambel vs. Wiseman* and *Day vs. Woodworth*, *supra*, and then said: "The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be meas-

ured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

"We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

These authorities seem conclusive of this question looked at as a question of Federal jurisprudence. It is urged, however, that this court should be governed by the statutes and decisions in Florida. We are not cited to any statute of Florida that establishes a rule of damages in cases like this so as to include attorneys' fees. It is provided that an attachment shall not issue until the person applying for it gives a bond conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out the attachment. Revised Statutes of Florida, 1892, sec. 1646. This statute creates no rule as to damages that would include counsel fees. It merely provides for the giving of a statutory recognizance, which is not the foundation of a right of action, but security only for the payment of damages. The damages referred to are such as are legally recoverable.

165 In *Wittich vs. O'Neal*, 22 Florida, 592, the court held, in a suit on an injunction bond, that the counsel fees incurred by the defendant in the suit to dissolve such an injunction are damages that may be recovered. The conclusion of the court is sustained by the decisions of the courts of last resort in many of the States. The learned chief justice of Florida, who delivered the opinion of the court, admits that his conclusions are in direct conflict with the decision of the United States Supreme Court in *Oelrichs vs. Spain*, 15 Wall. 211, and says: "The reasons set forth in *Oelrichs vs. Spain* are to our minds not satisfactory, and we think are fully answered in the brief of counsel for appellant." I do not understand that this opinion is based upon the construction of a statute. The learned chief justice, as I understand it, is making the decision upon general principles. The decision involves the construction of the bond.

The only Florida case to which our attention is called which involves a suit on an attachment bond is *Gonzales vs. De Funiak Havana Tobacco Co.*, 26 Sou. Rep. 1002. This case was decided December 6, 1899, which is subsequent to the date and alleged breach of the bond sued on in the case at bar. When the facts of the case are examined, it will be seen that it involved the allowance of attorneys' fees to the amount of $80, which were paid in defense of the main case. The court held that such allowance was improper; that the

condition of the bond to pay all costs and damages the defendant may sustain in consequence of improperly suing out the attachment will not admit of damages for the expense of defending the main suit. That disposed of the whole case before the court so far as the question of attorneys' fees is concerned. The court, however, added by way of dictum, that, by the great weight of authority, attorneys' fees incurred in relation to the attachment or in procuring its dissolution will be allowed as damages in actions upon attachment bonds. But if this decision was in point, being rendered subsequent to the transactions involved in this suit, it would not be binding on this court. *Burgess vs. Seligman*, 107 U. S. 20, 33; *Bartholomew vs. City of Austin*, 85 Fed. Rep. 359.

I do not find from the examination of the authorities presented by counsel, or from my own investigation, that there are any statutes or decisions of the State of Florida that establish the rule that the plaintiff in a suit on an attachment bond can recover as a part of his damages counsel fees incurred in obtaining a dissolution of the attachment. As I do not find the law so established in the
166 State of Florida, it is unnecessary to consider whether State decisions to that effect would be binding upon this court, or whether it would be the duty of this court to construe the bond and follow the decisions of the Supreme Court of the United States. *Olcott vs. The Supervisors*, 16 Wall. 678, 688; *Boyce vs. Tabb*, 18 Wall. 546; *Foxcroft vs. Mallett*, 4 How. 353, 370; *Carroll vs. Carroll's Lessee*, 16 How. 275, 287; *Swift vs. Tyson*, 16 Pet. 1, 19.

Controlled by the decisions of the Supreme Court, I am constrained to dissent from the opinion just read and to hold that the circuit court did not err in refusing to enter judgment on the special verdict.

In 1796 the Supreme Court suggested that, if the practice of refusing to allow attorneys' fees as damages was not strictly correct in principle, it was entitled to respect until it was changed or modified by statute. *Arcambel vs. Wiseman*, 3 Dall. 306. That remark surely cannot have less force now, when the rule appears to have been followed by the Federal courts for more than a century.

II. The distinguished counsel for the Bucki Company says that "the court below refused to submit to the jury the question as to how much damages the plaintiff sustained by reason of losses by the interruption and destruction of its business caused by the attachment." After stating the grounds on which the court based its decision, the learned counsel adds: "This action of the court is assigned as error and presents the leading and most important question for review in this court." The question as presented by the evidence offered, the exceptions reserved, and the errors assigned is naturally divided into two inquiries: 1st. Is the Bucki Company entitled to recover for loss of profits caused by the attachment? 2d. Is the Bucki Company entitled to recover for injury to its credit caused by the attachment? There is seemingly a great deal of conflict in authorities on these questions. The apparent conflict arises from decisions in jurisdictions controlled by varying statutes and by the failure to note,

in commentaries on them, the difference in the kinds of actions in which the damages are being adjusted. It is important at the outset, therefore, to keep in mind the nature of this suit. It is an action for breach of two attachment bonds. The suit is by the payee of the bonds—the defendant in the attachment suit—against the surety on the bonds. They are statutory bonds, their condition being fixed by statute. The condition of each bond is
167 that the principal shall well and truly "pay all costs and damages" which the payee may sustain in consequence of the principal's "improperly suing out said attachment." The suit is not an action on the case against a plaintiff for maliciously suing out an attachment. In the latter case a very different rule as to damages prevails. There is no statute in the State of Florida which makes the obligors on an attachment bond liable in an action on the bond for such damages as the plaintiff is liable for in an action on the case for maliciously and vexatiously suing out an attachment. In States where there are such statutes they control the decisions of the courts of the States as to the measure of damages. In some of the States the grounds on which an attachment is sued out cannot be traversed, but the defendant may at once sue for damages, and the obligors on the attachment bond are made liable, if the attachment was sued out maliciously, for such damages as the plaintiff in the attachment suit would be liable for in an action on the case for the malicious prosecution of the attachment. In Florida the defendant in the attachment suit may traverse the plaintiff's affidavit and move to dissolve the attachment (Revised Statutes of Florida, sec. 1655), and on its dissolution may sue on the bond and is entitled to recover only "all costs and damages" which it has sustained from the improper suing out of the attachment. There being no statute otherwise fixing the measure or kind of damages to be recovered, and the bond sued on conforming to the statute, we are confronted with the questions: What damages can properly be included in the construction of the statute and bond?—what damages were within the contemplation of the makers of the law and the parties to the contract? It cannot be held that the words "all damages" are used in their broadest sense. In some actions injury to the feelings are included and considered in establishing a plaintiff's damages, but it would not be claimed that a bond of this kind would include damages of that character. The defendant in attachment in some jurisdictions can sue the plaintiff in such suit in an action on the case, and if it is proved that the attachment was vexatious and malicious, damages may be recovered for every kind of injury to credit, business, or feelings. To sustain such suit malice upon the part of the defendant and want of probable cause for the attachment must both be proved. In a suit on the bond for actual damages malice need not be shown, nor can the defendant defend by showing probable cause. Injuries that recovery could be
168 had for only when malice exists and want of probable cause is shown, cannot be considered or estimated as covered by the bond. The statute and bond could not be intended to cover dam-

ages that are allowed only in cases where malice and want of probable cause is shown, and at the same time dispense with the allegation and proof of malice and cut off the defense of probable cause. In suits on the bond malice need not be proved. The existence of probable cause is no defense. The two suits for damages being so unlike in the issues raised and proof required, it may be expected that the rules as to the measure and proof of damages would be different. The legislature, in passing the act to require the bond, did not intend to impose on the sureties a liability as great as that imposed by law on the plaintiff in cases of malicious attachment. The condition of the bond is satisfied and its terms substantially complied with by awarding the plaintiff all costs and expenses incurred and caused by the attachment, and such damages as he may have sustained by being deprived of his property, or the use thereof, or any injury thereto, or its loss or destruction. The makers of the bond in an action on it are not liable for anything beyond such actual damages as are the direct result of the attachment.

The general principles controlling these questions seem to be clearly indicated in the opinions of the Supreme Court.

In *Watson vs. Sutherland*, 5 Wall. 74, the court incidentally discussed the question which is involved here. It was a suit in equity to enjoin a levy on a miscellaneous stock of goods. The injunction was resisted upon the ground that the defendant had an adequate and complete remedy at law. The court therefore considered the question as to what damages could be recovered at law for the seizure and sale of the goods. The court said it was well settled that "the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or, if sold, to the value of it, when taken, with interest from the time of the taking down to the trial." The court added: "Loss of trade, destruction of credit, and failure of business prospects, are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law." *North vs. Peters*, 138 U.S. 271, 281, is to the same effect. In the case of *Vance vs. W. A. Vandercock Company*, (No. 2), 170 U. S. 468, the court again had under discussion the question as to what damages could be recovered for the unlawful or illegal seizure of personal property. Mr. Justice White, delivering the opinion of the court, said: "Under
169 the decisions to which we have referred, it is evident that, in the case at bar, the measure of damages for the detention was interest on the value of the property from the time of the wrong complained of. This rule of damages has been held by this court to be the proper measure even in an action of trespass for a seizure of personal property where the facts connected with the seizure did not entitle the plaintiff to a recovery of exemplary damages. An action of this character was the case of *Canard vs. Pacific Insurance Company*, 6 Pet. 262. In the course of the opinion there delivered by Mr. Justice Story, the court held that the trial judge did not err in giving to the jury the following instruction:

"'The general rule of damage is the value of the property taken,

with interest from the time of the taking down to the trial. This is generally considered as the extent of the damages sustained, and this is deemed legal compensation with reference solely to the injury done to the property taken, and not to any collateral or consequential damages, resulting to the owner, by the trespass.'

"Indeed the same rule was in effect reiterated in *Watson vs. Sutherland*, 5 Wall. 74, 79, where it was substantially held that 'loss of trade, destruction of credit and failure of business prospects' could not be recovered in an action at law where malice or bad faith was not an ingredient, because such damages were collateral or consequential as regards a seizure of personal property, and could only be recovered at law where the issue of bad faith was involved. In other words, that however at law such damages might be considered when the suit was based upon a malicious trespass they were not a proximate result of an injury to property caused by an illegal seizure thereof."

It follows, I think, that the Bucki Company is not entitled to recover in this action for the loss of profits in its business caused by the issuance and levy of the attachment, and that it cannot recover damages in this action for injury to its credit. *Pettit & Owens vs. Mercer*, 8 B. Moore (Ky.), 51; *Weeks vs. Prescott*, 53 Vermont, 57, 58; *Braunsdorf vs. Fellner*, 76 Wisconsin, 1, 3; *Seattle Crockery Co. vs. Haley*, 6 Wash. 302; 33 Pac. Rep. 650, 653; *Kirbs & Spies vs. Provine*, 78 Texas, 353; Sedgwick on Damages (8th ed.), § 127; Sutherland on Damages (2d ed.), § 55.

So far as the levy on the real estate was concerned, it did not operate any change of possession (Revised Statutes of Florida, sec. 1651), or cause any damage. *Trawick vs. Martin-Brown Co.*, 170 79 Texas, 460; *Brandon vs. Allen & Co.*, 28 La. Ann. 60. We have to deal with the measure of damages for the unlawful seizure, without malice, of personal property. Pardee, circuit judge, speaking for this court, said: "The measure of damage for the unlawful seizure, without malice of personal property, where the property is subsequently returned to the owner, is the difference between the value of the goods at the time and place of the unlawful taking and at the time and place where returned, in addition to the value of the use during the time of detention." *Coulson vs. Panhandle Nat. Bank*, 54 Fed. Rep. 855, 859. The Supreme Court applied this rule in the case of a trespasser. *Bates vs. Clark*, 95 U. S. 204. A surety on an attachment bond, with the condition as in this case, in the absence of malice, should not be held to a harsher measure of damages than that applied to a naked trespasser.

I think that the charges given by the circuit court are not in conformity with the law as held by the Supreme Court, and that the assignments of error made by the Fidelity Company as to the charges quoted are well taken.

Endorsed: Filed May 28, 1901. J. M. McKee, clerk.

171 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 172 pages, numbered from "*a*" to 171, inclusive, contain a true copy of the record and all proceedings had, including the opinion of the court and the dissent therefrom in the case of

THE L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND } 925.

as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof, I hereunto subscribe my name, and affix the seal of said United States circuit court of appeals at the city of New Orleans, this 30th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

6 *Caption.*

UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1900, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, the Honorable A. P. McCormick, and the Honorable David D. Shelby, United States circuit judges for the fifth judicial circuit.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } 926.

Be it remembered that heretofore to wit, on the 30th day of March, 1900, a transcript of the record from the circuit court of the United States for the southern district of Florida, was filed in the office of the clerk of said United States circuit court of appeals, for the fifth circuit, in the words and figures following, to wit:

1 United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER CO.
versus
FIDELITY AND DEPOSIT CO.

Transcript from State court.

Præcipe for Summons.

In the Circuit Court, Fourth Judicial —, in and for Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation Organized and Existing under the Laws of the State of New Jersey, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation Organized and Existing under the Laws of the State of Maryland, Defendants.

Action on attachment bond; damages, $200,000.

To P. D. Cassidey, clerk of said court:

You will please issue *summons ad res.* in the above-entitled cause, returnable according to law.

H. BISBEE,
Att'y for Plaintiff.

(Indorsed:) Filed March 25, 1898. P. D. Cassidey, cl'k, by C. W. Frazier, D. C.

2 *Summons ad Respondendum.*

The State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to summons Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, if *he* be found in your county, to be and appear before the judge of our circuit court for the fourth judicial circuit of the State of Florida, at the clerk's office in Jacksonville, on the first Monday of May, next, at a court to be held on that day, in and for the county of Duval, then and there to answer L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, in an action on attachment bond, damages 200,000 dollars. And have then and there this writ.

Witness P. D. Cassidey, clerk of our said court, and the seal of the said court at the court-house in Jacksonville, county aforesaid, this 25th day of March, A. D. 1898.

[SEAL.]

P. D. CASSIDEY, *Clerk*,
By C. W. FRAZIER,
Deputy Clerk.

H. BISBEE,
Attorney for Plaintiff.

(*Sheriff's Return Endorsed on said Summons.*)

Received this summons on the 25th day of March, A. D. 1898, and executed the same on the 26th day of March, A. D. 1898, in the county of Duval, Florida, by delivering a true copy thereof to R. Bowen Daniel as the resident general agent of the within-named defendant corporation, to wit: Fidelity and Deposit Company of Maryland—at the same time showing the original and making known the contents thereof. Not being able to find the president, or vice-president, or other head of said corporation, or the cashier, or treasurer, or secretary or general manager, or any of its directors, service was made as above.

N. B. BROWARD,
Sheriff of Duval County, Florida,
By R. H. BISHOP,
Deputy Sheriff.

(Indorsed:) Filed Mar. 30, 1898. P. D. Cassidey, clerk c't ct.

3 *Præcipe for Appearance.*

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

L. BUCKI & SON LUMBER COMPANY, a Corpor'n,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corpor'n.

The clerk of the circuit court of Duval county, Florida, will please enter my appearance for the defendant in the above-stated cause.

R. H. LIGGETT,
Att'y for Def't.

(Indorsed:) Filed May 2, 1898. P. D. Cassidey, clerk c't ct.

Declaration.

In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

L. Bucki & Son Lumber Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, plaintiff, sues The Fidelity & Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, defendant, for that heretofore, to wit: on the first day of October, 1897, the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, did institute its suit in the circuit court of Florida, fourth judicial circuit, in and for Duval county, against the plaintiff herein, and then and there, by its agent, Frank H. Elmore, who was then and there a clerk in the employ of the said The Atlantic Lumber Company, make and verify under oath, an affidavit in the words and figures following, to wit:

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

THE ATLANTIC LUMBER COMPANY, a Corp'n,
vs.
L. BUCKI & SON LUMBER COMPANY, a Corp'n.

4 STATE OF FLORIDA,
Duval County.

Be it remembered that on this the 1st day of October, 1897, in the county of Duval and State of Florida, before the undersigned, personally came Frank H. Elmore, who made oath that he is the duly authorized agent of the Atlantic Lumber Company for the purpose of making this affidavit, and that the said The Atlantic Lumber

Company is a corporation existing under the laws of the State of Florida; that the L. Bucki and Son Lumber Company is a corporation existing under the laws of the State of New Jersey, and resides beyond the limits of the State of Florida; that the said L. Bucki and Son Lumber Company is indebted to the said The Atlantic Lumber Company, in the sum of $9,980.80, and that the same is actually due; and that the said L. Bucki and Son Lumber Company owns and possesses a large number of logs and a great quantity of timber and lumber situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, and that the said The Atlantic Lumber Company has a statutory lien upon all of the said logs, timber and lumber, belonging to the said L. Bucki and Son Lumber Company, and has this day commenced a suit in the circuit court of the State of Florida for the fourth judicial circuit, in and for the county of Duval, for the purpose of enforcing the said lien; and that the said property will be removed beyond the jurisdiction of the circuit court for the fourth judicial circuit of Florida, in and for the said county of Duval; and that the said The Atlantic Lumber Company, has reason to believe that the said logs, timber and lumber are about to be removed from Duval county, Florida, in which they are now situated; and that the said L. Bucki and Son Lumber Company is about to remove its property out of the State of Florida.

FRANK H. ELMORE.

Sworn to and subscribed before me, this 1st day of October, 1897.

P. D. CASSIDEY,
Clerk Circuit Court,
By H. J. CASSIDEY,
Deputy Clerk.

[SEAL.]

And on the first day of October, 1897, the defendant, The Fidelity & Deposit Company of Maryland, for the purpose of securing the plaintiff against all costs and damages which said plaintiff might sustain in consequence of the improper suing out of a writ of attachment in said action against the goods and chattels, lands and tenements of the said plaintiff for the sum mentioned in said affidavit, to wit: nine thousand nine hundred and eighty dollars and eighty cents, by the said The Atlantic Lumber Company, did make and enter into its certain writing obligatory, under the corporate seal of said defendant company, which said writing obligatory was in the words and figures following, to wit:

Know all men by these presents, that Frank H. Elmore, agent for the Atlantic Lumber Company, a corporation under the laws of the State of Florida, as principal and the Fidelity and Deposit Company of Maryland, of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly authorized under the laws of the State of Florida to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, in the sum of twenty thousand dollars, for the payment

whereof, well and truly to be made, they do hereby bind themselves, their successors and assigns, jointly and severally.

Signed and sealed on this the 1st day of October, 1897.

The condition of the foregoing obligation is such that whereas the said The Atlantic Lumber Company has this day applied for an attachment against the goods and chattels, land and tenements of the said L. Bucki and Son Lumber Company, for the sum of nine thousand nine hundred and eighty and $\frac{80}{100}$ dollars, now if the said Frank H. Elmore, agent for the Atlantic Lumber Company shall well and truly pay all costs and damages which the said L. Bucki & Son Lumber Company may sustain in consequence of it, the said Atlantic Lumber Company, improperly suing out said attachment, then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

FRANK H. ELMORE, [SEAL.]
Agent for the Atlantic Lumber Co.
FIDELITY & DEPOSIT COMPANY OF MARYLAND,
By D. U. FLETCHER.

Attest: SAM'L J. SLATER,
Agent for the Company.
[CORPORATE SEAL.]

Taken and approved this 1st day of October, 1897.

P. D. CASSIDEY,
Clerk Circuit Court,
By H. J. CASSIDEY, [SEAL.]
Deputy Clerk.

And the said The Atlantic Lumber Company, then and there filed the said affidavit and the said bond or writing obligatory in the circuit court of Duval county, State of Florida; and thereupon did cause or procure a writ of attachment to be issued in behalf of
6 the said The Atlantic Lumber Company, against all of the logs, timber and lumber belonging to the L. Bucki and Son Lumber Company, situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, or so much thereof as could be found, as would satisfy the sum of nine thousand nine hundred and eighty dollars and eighty cents, which said writ of attachment was in words and figures following, to wit:

The State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to attach and take into custody all of the logs, timber and lumber belonging to the L. Bucki and Son Lumber Company situated at or near its mill site in Duval county, Florida, in the city of Jacksonville, or so much as can be found as will be sufficient to satisfy the debt or sum demanded, to wit: $9,980.80 with costs, in that certain suit pending in the circuit court of the fourth judicial circuit of the State of Florida, in and for Duval

county, wherein The Atlantic Lumber Company, a corporation existing under the laws of the State of Florida is plaintiff, and L. Bucki & Son Lumber Company, a corporation under the laws of the State of New Jersey, is defendant. And make return of this writ according to law.

Witness the Honorable R. M. Call, judge, as also P. D. Cassidey, clerk, and the seal of said court, at the court-house in Jacksonville, Florida, this 1st day of October, A. D. 1897.

P. D. CASSIDEY, *Clerk*,
[SEAL.] By H. J. CASSIDEY,
Deputy Clerk.

R. H. LIGGETT,
Plaintiff's Attorney.

And the said The Atlantic Lumber Company, then and there improperly and without just cause, caused the sheriff of the said county of Duval to levy the said writ upon the property of the plaintiff of the value of over fifteen thousand dollars, to wit: upon one million two hundred and fifty thousand feet of yellow-pine merchantable lumber then at plaintiff's mill site in the city of Jacksonville, Duval county, Florida, all of which was then and there the property of the plaintiff; and then and there the said The Atlantic Lumber Company caused the said sheriff to take and the said sheriff did take under and by virtue of the said writ, into his, the said sheriff's possession and custody, all of the said lumber, for a long period of time, to wit: for one month.

And the plaintiff declares upon the said bond or writing obligatory of the defendant hereinbefore set forth and shows as a
7 breach of the condition thereof, that the said writ of attachment, mentioned in said bond, and hereinbefore set forth, was improperly sued out by the said The Atlantic Lumber Company, for that the averment in the said affidavit, hereinbefore set forth, that the plaintiff, the defendant in said attachment proceedings, was indebted to the said The Atlantic Lumber Company in the sum of ninety-nine hundred and eighty dollars and eighty cents ($9,980.80) was as plaintiff avers, false and untrue, at the time when made, and the said The Atlantic Lumber Company had no meritorious cause of action therefor, against this plaintiff, the defendant in said attachment proceedings. And the plaintiff avers that the allegations in the said affidavit that the said The Atlantic Lumber Company had a lien on all of the said logs, timber and lumber belonging to the plaintiff mentioned in said attachment affidavit; and that the said property would be removed beyond the jurisdiction of the circuit court for the fourth judicial circuit of Florida in and for the said county of Duval; and that the said The Atlantic Lumber Company, had reason to believe that the said logs, timber and lumber were about to be removed from Duval county, Florida, in which they were then situated and that plaintiff was about to remove its property out of the State of Florida, were, and each and every of such allegations was false and untrue, at the time when made. And this plaintiff avers that on the first of October, A. D.

1897, it was and for many years prior thereto had been engaged at the said mills and premises in the manufacture of hard-pine lumber and timber, and that it had on the day and year aforesaid, and at all times for several years prior thereto, an officer and agent in its employ and present in the said county of Duval upon whom personal service of any process of a court of law or equity, both mesne and final, could be legally made which was well known to the Atlantic Lumber Company, on the day and year aforesaid. And the plaintiff avers that it, on, to wit: the first day of October, A. D. 1897, did not reside beyond the limits of the State of Florida within the sense and meaning of the attachment laws of the State of Florida, and that all its business as a manufacturer of lumber aforesaid was done and performed, on the day and year aforesaid, and for many years prior thereto, in the said county of Duval, which was well known to said The Atlantic Lumber Company, on the day and year aforesaid.

And the plaintiff further avers that afterwards, to wit: on the twenty-first day of October, in the year aforesaid, the said suit by the said The Atlantic Lumber Company against the plaintiff, and the said writ of attachment and all proceedings had thereon and therein, were duly removed under the laws of the United
8 States of America, to the circuit court of the United States for the southern district of Florida, and afterwards, to wit: on the 1st day of November, in the year A. D. 1897, on the motion of the plaintiff (the defendant in the said attachment proceedings) in the said last-mentioned court to dissolve the said writ of attachment, on grounds apparent on the face of the record, after argument of counsel for plaintiff and defendant, the court did render its judgment dissolving the said writ of attachment, among other reasons, on the ground that there was not due the said The Atlantic Lumber Company on the said 1st day of October, 1897, said sum of money on which it could maintain a suit on said day against the plaintiff, and ordered that all of the property so as aforesaid levied upon, under and by virtue of the writ to be delivered and returned to the plaintiff, and the said judgment dissolving the said writ of attachment remains in full force and effect, and is in no way reversed or made void.

And this plaintiff further avers that at the time the said lumber was levied upon as aforesaid, in virtue of the said writ, the plaintiff was engaged in an extensive business of manufacturing hard-pine lumber at and by the use of its mills, dry kilns and mill plant in which said business, the plaintiff manufactured and sold, hard-pine timber and lumber in an amount averaging for each working day in the year, one hundred thousand feet board measure and upwards; and that the said one million two hundred and fifty thousand feet of yellow-pine merchantable lumber, so as aforesaid levied on by virtue of said writ of attachment, was the manufactured product of plaintiff's said mills and mill plant, and was a part of plaintiff's stock in trade; and by reason of said improper issuing and levy of the said writ, the plaintiff's said business was seriously injured for a long period of time, to wit: for six months, and by the reason aforesaid, the plaintiff was interrupted, hindered and delayed and

obstructed in its said business for the period of, to wit: six months and upwards, to the great damage and injury of the plaintiff.

And the plaintiff avers that it has been put by reason of the premises, and the levying of the said writ, to great expense and trouble in and about the procuring the discharge and dissolution of the said writ of attachment, and has been compelled to pay out large sums of money for traveling expenses, of the officers and agents of plaintiff, to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out other large sums of money, as costs and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys'
9 fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the said improper issuing of the said writ, and the levy thereof, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times Union and Citizen, and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers; and has been damaged in other large sums of money by not being able, in consequence of the said writ and levy thereof, to perform contracts and fill orders for manufacturing timber and lumber, which contracts were entered into, and which orders were accepted before the said writ was issued.

And the plaintiff claims twenty thousand dollars damages.

And for that heretofore, to wit: on the first day of October, 1897, the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, did institute its suit in the circuit court of Florida, fourth judicial circuit, in and for Duval county, against the plaintiff herein, and then and there, by its agent, Frank H. Elmore, who was then and there a clerk in the employ of the said The Atlantic Lumber Company, make and verify under oath, an affidavit in the words and figures following, to wit:

Fourth Judicial Circuit of Florida, Circuit Court of Duval County.

ATLANTIC LUMBER COMPANY, a Corporation,
vs.
L. BUCKI AND SON LUMBER COMPANY, a Corporation.

STATE OF FLORIDA,
Duval County.

Be it remembered, that on this the 1st day of October, 1897, in the county of Duval and State of Florida, before the undersigned, personally came Frank H. Elmore, who made oath before me that he is an agent of the Atlantic Lumber Company, a corporation existing under the laws of the State of Florida, and its authorized agent, for the purpose of making this affidavit; and that the L

Bucki and Son Lumber Company is a corporation under the laws of the State of New Jersey, and resides beyond the limits of the State of Florida; that the said L. Bucki and Son Lumber Company is indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars, and that the same is actually due; and that the affiant has reason to believe, that the said L. Bucki and Son Lumber Company is about to remove its property out of the State of Florida; and that it is fraudulently disposing of its property; and that it will fraudulently part with its property before judgment can be obtained against it; and that it resides beyond the limits of the State of Florida.

FRANK H. ELMORE.

Sworn to and subscribed before me this 1st day of October, 1897.

P. D. CASSIDEY,
[SEAL.] *Clerk Circuit Court of Duval County, Florida,*
By H. J. CASSIDEY,
Deputy Clerk.

And on the first day of October, 1897, the defendant, The Fidelity & Deposit Company of Maryland, for the purpose of securing the plaintiff against all costs and damages which said plaintiff (defendant in said attachment proceedings) might sustain in consequence of the said The Atlantic Lumber Company's improperly suing out a writ of attachment in said action against the goods and chattels, lands and tenements of the plaintiff (defendant in said attachment proceedings) for the sum of seventy-five thousand dollars, did make and enter into its certain writing obligatory, under the corporate seal of said defendant company, which said writing obligatory was in the words and figures following, to wit:

Know all men by these presents, that Frank H. Elmore, agent for the Atlantic Lumber Company, a corporation under the laws of the State of Florida, as principal, and the Fidelity and Deposit Company of Maryland, of Baltimore, a corporation organized and existing under the laws of the State of Maryland, and duly authorized, under the laws of the State of Florida, to do business in the State of Florida, as surety, are held and firmly bound unto the L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, in the sum of one hundred and fifty thousand dollars, for the payment whereof, well and truly to be made, they do bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed this the 1st day of October, 1897.

The condition of the foregoing obligation is such that whereas the said The Atlantic Lumber Company has this day applied for an attachment against the goods and chattels, lands and tenements of the said L. Bucki and Son Lumber Company for the sum of seventy-five thousand dollars, now if the said Frank H. Elmore, agent for the

Atlantic Lumber Company shall well and truly pay all costs
11 and damages which the said L. Bucki and Son Lumber Company may sustain in consequence of it the said The Atlantic Lumber Company, improperly suing out said attachment, then this obligation shall become null and void, otherwise it shall remain of full force and virtue.

FRANK H. ELMORE, [SEAL.]
Agent for the Atlantic Lumber Co.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By D. U. FLETCHER. [SEAL.]

Attest: SAM'L J. SLATER, JR.,
[SEAL.] *Agent for the Company.*

Taken and approved by me this 1st day of October, 1897.

P. D. CASSIDEY,
Clerk Circuit Court,
By H. J. CASSIDEY,
Deputy Clerk.

And the said The Atlantic Lumber Company, then and there filed the said affidavit and the said bond or writing obligatory in the circuit court of Duval county, State of Florida; and thereupon did cause or procure a writ of attachment to be issued in behalf of the said The Atlantic Lumber Company, against the goods, chattels, lands and tenements of the plaintiff, in and for the sum of seventy-five thousand dollars, which said writ of attachment was in the words and figures following, to wit:

State of Florida to all and singular the sheriffs of the State of Florida:

You are hereby commanded to attach and take into custody so much of the goods and chattels, lands and tenements of L. Bucki and Son Lumber Company, a corporation existing under the laws of the State of New Jersey, as will be sufficient to satisfy the debt or sum demanded, to wit: $75,000.00 with costs, in that certain suit pending in the circuit court of the fourth judicial circuit of the State of Florida, in and for Duval county, wherein The Atlantic Lumber Company, a corporation existing under the laws of the State of Florida, is plaintiff, and L. Bucki and Son Lumber Company, a corporation under the laws of the State of New Jersey, is defendant. And make return of this writ according to law.

Witness the Honorable R. M. Call, judge, as also P. D. Cassidey, clerk, and the seal of said court at the court-house in Jacksonville, Florida, this 1st day of October, A. D. 1897.

[SEAL.]

P. D. CASSIDY, *Clerk,*
By H. J. CASSIDEY,
Deputy Clerk.

R. H. LIGGETT,
Plaintiff's Attorney.

12 And the said The Atlantic Lumber Company, then and there improperly, and without just cause, caused the sheriff of the said county of Duval, to levy the said writ upon the property of the plaintiff of the value of over three hundred thousand dollars, to wit: upon the saw-mill and saw-mill plant, three planing mills, three dry kilns, and the boilers, engines and machinery, tools and implements connected to and with the said mills and dry kilns, and upon the land of the plaintiff upon which the said properties were located, and upon a large amount and number of boilers, engines, machinery, tools and implements in and about and upon the said lands, not in use, and known as duplicate machinery, and upon four million feet of manufactured timber and lumber then in and on and about the land, and upon three million five hundred thousand feet of logs in the boom and pens of the plaintiff, near said mills, all of which was then and there the property of the plaintiff, and then and there the said The Atlantic Lumber Company improperly and without just cause, caused the said sheriff under and by virtue of the said writ, to take all of the said lands and properties into his, the said sheriff's possession and custody, and to deprive the plaintiff of the possession and use thereof, for a long period of time, to wit: for six months.

And the plaintiff declares upon the said bond and writing obligatory of the defendant, hereinbefore set forth, and shows as a breach of the condition thereof, that the said writ of attachment mentioned in said bond, and hereinbefore set forth, was improperly sued out, by the said The Atlantic Lumber Company, for that the averment in the said affidavit hereinbefore set forth, that the said plaintiff, the defendant in the said attachment proceedings, was indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars was false and untrue, at the time when made, and was made without just cause. And the plaintiff avers that the allegations in the said affidavit that the affiant had reason to believe that the plaintiff was about to remove its property out of the State of Florida; and that plaintiff was fraudulently disposing of its property; and that plaintiff would fraudulently part with its property before judgment could be obtained against it, were and each and every of such allegations was false and untrue, at the time they were made, and made without just cause. And this plaintiff further avers that on the first day of October, A. D. 1897, it was, and for many years prior thereto had been, engaged at the said mills and premises in the manufacture of hard-pine lumber and timber, and that it had on the day and year aforesaid, and at all times for several years prior thereto, an officer and agent in its employ, and present in the county of Duval,

13 upon whom personal service of any process of a court of law or equity, both mesne and final, could be legally made, which was well known to the said The Atlantic Lumber Company on the day and year aforesaid. And the plaintiff avers that it, on, to wit: the first day of October, A. D. 1897, did not reside beyond the limits of the State of Florida, within the sense and meaning of the attachment laws of the State of Florida, and that all of its business as a manufacturer of lumber aforesaid was done and performed, on the

day and year aforesaid, and for many years prior thereto, in the said county of Duval, which was well known to the said The Atlantic Lumber Company on the day and year aforesaid.

And the plaintiff further avers that afterwards, to wit: on the twenty-first day of October, in the year aforesaid, the said suit by the said The Atlantic Lumber Company against the plaintiff, and the said writ of attachment and all proceedings had thereon and therein, were duly removed under the laws of the United States of America, to the circuit court of the United States for the southern district of Florida, and afterwards, to wit: on the 14th day of February, in the year A. D. 1898, on motion of the plaintiff (the defendant in the said attachment proceedings) in the said last-mentioned court, to dissolve the said writ of attachment on issues of fact as to the debt and sum demanded in the said affidavit, and as to the special causes assigned, for such writ in the said affidavit, and on diverse grounds, among which was the ground that said attachment suit was brought to recover unliquidated damages, to wit: the sum named in the contract sued on as a penalty for the breach thereof, the said court, after a protracted trial and investigation of the said issues, did, upon the testimony adduced by the said The Atlantic Lumber Company, and without any evidence being adduced by the plaintiff, at the said trial on the said motion and issues, render its judgment dissolving the said writ of attachment, and ordered all of the property so, as aforesaid, levied upon, under and by virtue of the said writ, to be delivered and returned to the plaintiff; and the said court then and there found that the plaintiff was not on the first day of October, 1897, indebted to the said The Atlantic Lumber Company in the sum of seventy-five thousand dollars, and the said judgment dissolving the said writ of attachment remains in full force and effect, and is in no way reversed, or made void.

And this plaintiff further avers that at the time the said goods, chattels, lands and tenements and mills were levied upon as aforesaid, in virtue of the said writ, the plaintiff was engaged in an extensive business of manufacturing hard-pine lumber at and by the use of the said mills, goods, chattels, lands and tenements, in
14 which said business the plaintiff manufactured and sold hard-pine lumber in an amount averaging for each working day in the year one hundred thousand feet, board measure, and upwards; and by reason of improper issuing and levy of the said writ the plaintiff's said business was destroyed and ruined for a long period of time, to wit, for six months, and thus the plaintiff's said business was wholly lost to it, and by the reason aforesaid, the plaintiff was interrupted, hindered and delayed and obstructed in its said business for the period of to wit: six months, and upwards, to the great damage and injury of the plaintiff.

And the plaintiff avers that it has been put, by reason of the premises, and the levying of the said writ, to great expense and trouble in and about procuring the discharge and dissolution of the said writ of attachment, and has been compelled to pay out large sums of money for traveling expenses, of the officers and agents of plaintiff to attend court, and in preparing for the trial of the said

motion to dissolve the said attachment; and has been compelled to pay out other large sums of money as costs and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the improper issuing of the said writ and the levy thereof, as aforesaid, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business aforesaid, for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen, and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers and has been damaged in other large sums of money, by not being able in consequence of the said writ and levy thereof, to perform contracts, and fill orders for the manufacture of timber and lumber, which contracts were entered into, and which orders were accepted before the said writ was issued, and has been damaged in other large sums of money by being compelled to pay the salaries of its officers and employés when idle, by reason of the said writ and levy, which said employés and officers were necessarily in the employ of plaintiff under contracts for fixed salaries by the year.

And plaintiff claims one hundred and fifty thousand dollars damages.

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Filed May 2, 1898. P. D. Cassidey, clerk c't ct.

15 *Petition for Removal.*

In Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Def't.

Petition for removal of cause from circuit court of Duval county, Florida, to the circuit court of the United States for the southern district of Florida, fifth circuit.

Your petitioner, Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, respectfully shows to this honorable court that it is the defendant in this suit, which is of a civil nature and that the matter and amount in dispute in this case exceeds the sum or value of two thousand dollars, exclusive of interest and costs.

2nd. That the controversy herein is between citizens of different States; that the plaintiff, L. Bucki and Son Lumber Company was at the time of the commencement of this suit, and still is, a corpora-

tion organized and existing under the laws of the State of New Jersey, and consequently was and is a citizen of the State of New Jersey, having its office and the place of its meetings of its officers, your petitioner is informed and believes at —— in said State, and that your petitioner, Fidelity and Deposit Company of Maryland at the time of the commencement of this suit and still is a corporation organized and existing under the laws of the State of Maryland, and therefore is a citizen of the State of Maryland, and of no other State, having its principal place — office in the city of Baltimore in said State.

3rd. That your petitioner desires to remove this suit before the trial thereof, into the United States circuit court, fifth judicial circuit, in and for the southern district of Florida. And your petitioner further represents that this suit was commenced on the 25th day of March, A. D., 1898, at which time the præcipe for summons was filed herein, and summons was issued returnable to the first Monday, to wit: the 2nd day of May, A. D. 1898, at which time your petitioner caused its appearance to be duly entered by its attorneys herein, and your petitioner is not required by the laws of the State of Florida, or by the rules of this court to plead to the declaration of the plaintiff herein until the first Monday, to wit: the
16 6th day of June, A. D. 1898, and has made no defense and filed no plea herein.

4th. Your petitioner offers herewith good and sufficient surety for its entry in the circuit court of the United States for the southern district of Florida on or before the said rule day in June, to wit: June 6th, A. D. 1898, a copy of the record in this suit, and for paying all costs which may be awarded by the said circuit court of the United States if said court shall hold that this suit was wrongfully and improperly removed thereto. And your petitioner therefore prays that the said surety and bond may be accepted, that this suit may be removed into the said circuit court of the United States to be held in the southern district of Florida, as aforesaid, pursuant to statutes of the United States in such case made and provided, and that no further proceedings may be had herein in this court.

And your petitioner will ever pray, etc.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Per H. CRAWFORD BLACK,
Vice-President, Petitioner.

H. E. BULE, *Secretary.* [SEAL.]
D. U. FLETCHER AND
R. H. LIGGETT,
Attorneys for Petitioner.

STATE OF MARYLAND, }
City of Baltimore, }

H. Crawford Black makes oath that he is the vice-president of the above-named Fidelity and Deposit Company of Maryland, that the foregoing petition is true to his own knowledge, except as to matters

therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

H. CRAWFORD BLACK,
Vice-President.

Subscribed and sworn to before me this 3rd day of May, A. D. 1898.

FRED S. AXTELL,
Notary Public. [SEAL.]

(Indorsed:) Filed May 4th, 1898. R. M. Call, judge. Filed June 4, 1898. P. D. Cassidey, clerk.

Bond for Removal of Cause.

In the Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

17 L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Know all men by these presents, that we, Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as principal, and R. C. Cooley and R. Bowen Daniel of Duval county, Florida, as sureties, are holden and stand firmly bound unto the L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of the State of New Jersey, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the L. Bucki and Son Lumber Company, a corporation as aforesaid, its successors and assigns, we bind ourselves, successors, heirs, representatives and assigns jointly and firmly by *there* (these) presents, upon condition, nevertheless, that, whereas the said Fidelity and Deposit Company of Maryland has filed its petition in the circuit court of Duval county, Florida, for the removal of a certain cause therein pending wherein the said L. Bucki and Son Lumber Company is plaintiff, and the said Fidelity & Deposit Company of Maryland is defendant, to the circuit court of the United States, in and for the southern district of Florida; now if the said Fidelity & Deposit Company of Maryland shall enter in the said circuit court of the United States on or before the first Monday of June next, to wit: June 6th, 1898, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully and improperly removed thereto, then this obligation to be void, otherwise shall remain in full force and virtue.

In witness whereof the said Fidelity and Deposit Company, by its proper officer duly authorized and empowered thereto, and R. C.

Cooley and R. Bowen Daniel have hereunto set our hands and seals this 18th day of May, A. D. 1898.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By H. CRAWFORD BLACK, *Vice-President.*
H. E. BULE, *Sect.* [SEAL.]
R. C. COOLEY. [SEAL.]
R. BOWEN DANIEL. [SEAL.]

[CORP. SEAL.]

(Indorsed:) Filed May 4, 1898. R. M. Call, judge. Filed June 4, 1898. P. D. Cassidey, clerk.

18 *Order for Removal.*

In the Circuit Court, Fourth Judicial Circuit, Duval County, Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The defendant herein having within the time provided by law filed its petition for the removal of this cause to the circuit court of the United States for the southern district of the State of Florida, and having at the time offered its bond with R. C. Cooley and R. Bowen Daniel good and sufficient sureties, pursuant to the statute and conditioned according to law, now, therefore, this court does hereby accept and approve the said bond and accept said petition and it is ordered that this cause be removed for trial to the circuit court of the United States for the southern district of Florida, pursuant to the statutes of the United States, as prayed in and by said petition, and that all other proceedings in this court be stayed.

R. M. CALL, *Judge.*

I, P. D. Cassidey, clerk of the circuit court of the State of Florida, fourth judicial circuit in and for the county of Duval, do hereby certify that the foregoing pages numbered from one to 31 inclusive, constitute a true copy of all the papers, proceedings and records in the case of L. Bucki and Son Lumber Company a corporation organized and existing under the laws of the State of New Jersey, plaintiff, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, defendant, as appears upon the files and records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this the 12 day of November, A. D. 1898.

[SEAL.] P. D. CASSIDEY,
Clerk of the Circuit Court of the State of Florida, Fourth Judicial Circuit in and for the County of Duval.

(Indorsement on back of transcript:) L. 35. No. 116. U. S. court so. dist. Florida. L. Bucki & Son L. Co. *vs.* Fidelity and Deposit Co. Transcript from State court. Filed Nov. 12, 1898. E. O. Locke, clerk.

19 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff by H. Bisbee, its attorney, and amends each count in the plaintiff's declaration herein, by adding after the word "issued," in next to the last line of the first count of the declaration the following words, to wit: "and that no part of the said costs and damages have ever been paid to the plaintiff." And the plaintiff amends the second count of the said declaration by adding after the word "year," in the third line from the close of said count, the following words, to wit: "That no part of the said costs and damages have ever been paid to the plaintiff." And to the extent of the said amendments, the plaintiff confesses the demurrer filed to the said declaration.

And the plaintiff further amends the second count of the said declaration, by striking out the following words, to wit: "to wit: the sum named in the contract sued on as penalty for the breach thereof."

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Amendment to declaration. Filed Nov. 21st, 1898. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI AND SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Now comes the defendant in the above-stated cause, by its attorneys, and, subject to its demurrer heretofore filed to the declaration herein which it insists upon as applicable to the declaration as amended, moves the court to strike from the said declaration the allegation hereinafter particular- specified, and, severally, to strike from said declaration, and from each count thereof, each of the said allegations, upon the ground that the said allegations, and each one thereof, are calculated to embarrass and prejudice a fair trial of the cause and are impertinent to the cause of action set forth in the said declaration, and in each count thereof, viz:

20 1st. All allegations appearing in each count of the declaration relating to the improper levying of the writs of attachment therein referred to.

2nd. All allegations appearing in each count of the said declaration stating that allegations appearing in the plaintiff's affidavits for attachment in the causes herein referred to were false and untrue.

3rd. All allegations to the effect that plaintiff had at all times an agent in Duval county, Florida, upon whom services or process could be made, and that plaintiff was not a non-resident of the State of Florida within the meaning of the attachment law.

4th. All allegations appearing in each count of said declaration relating to the special business in which plaintiff was engaged, and to damage sustained by it in that special business by reason of the issuance and levy of the writs of attachment.

5th. All allegations appearing in each of said counts to the effect that plaintiff was compelled to pay counsel fees, and to incur liability for counsel fees, to procure a dissolution of the attachments herein referred to.

6th. All allegations appearing in each of said counts as to injury sustained by plaintiff in its credit, and as to its inability to carry on business for want of credit, by reason of said attachments, and by reason of the publication thereof in the newspaper referred to in said counts.

7th. All allegations in relation to damages sustained by plaintiff in consequence of its liability to perform contracts with third persons, and to fill orders, for manufactured timber and lumber, in consequence of the levy of said writs of attachment.

And the defendant further moves the court to strike from the second count of the said declaration the following allegations therein contained on the same grounds, viz:

a. The allegation appearing in said count to the effect that plaintiff moved to dissolve the attachment on the ground that it was for unliquidated damages.

b. The allegation to the effect that the attachment was dissolved upon the testimony introduced by the Atlantic Lumber Company, and without any evidence being introduced by the plaintiff.

c. The allegation as to the plaintiff being engaged in business by the use of the property levied upon under the writ of attachment, and that its business was interrupted, hindered, destroyed and ruined by reason of the levy of said writ.

R. H. LIGGETT.
D. U. FLETCHER.

21 And defendant by its attorneys, moves the court to require the plaintiff to file a full, complete and itemized bill of particulars of the items and amount of damages claimed by it, by reason of the facts alleged in the declaration, upon which it seeks to recover damages, for the reason that such bill or particulars is indispensable in order to enable defendant to prepare its defense.

R. R. LIGGETT,
D. U. FLETCHER,
Attorneys for Defendant.

(Indorsed:) Motion to strike various allegations from declaration and for bill of particulars. Filed Dec. 3rd, 1898. E. O. Locke, clerk.

In the United States Circuit Court, Southern District of Florida.

THE L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Action on Attachment Bond.

This cause coming on to be heard upon the demurrer to the declaration and motion to strike certain portions of the declaration herein filed, and having been fully heard and considered it is ordered that said demurrer be overruled, and that the words "without just cause" found in the 8th line of the 10th page of the record of the circuit court of the State of Florida, and the words "among other reasons" in the second line of the 13th page in said records, and the whole of the 8th, 9th, 10th and 11th lines of the 14th page and the language beginning with "and attorneys' fees" in the 12th line of said 14th page down to the words "and has been" in the 24th line of said page of the first count of said declaration; and the words beginning with "among which" in the 20th line 22nd page down to and including the words "for the breach thereof" in the 23rd line of the 22nd page and the words beginning with "upon" in the 24th line of said 22nd page and including all of the first line of said 22nd page of the declaration; and the words beginning with "traveling" in the 6th line, 24th page down to and including the first word of the 10th line; and the words beginning with and including "and attorneys' fees" in said 10th line down to the words "has been" in the 23rd line of the 24th page, be and they are hereby ordered stricken from said declaration.

22 And it is further ordered that the plaintiff file herein a bill or particulars showing the contracts made as alleged before said attachment, and the salaries paid to employés as alleged.

Done and ordered this 11th day of February, 1899.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Order upon demurrer and motion to strike certain portions of the declaration. Filed Feb. 11th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.
} Bill of Particulars.

The names and annual salaries of officers and employés of the plaintiff on the first day of October, 1897, are as follows:

Chas. L. Bucki, president	$5,000
J. D. Heagy, mill superintendent	2,500
W. C. Cox, stenographer	720
J. B. Rosser, auditor and book-keeper	1,500
Frank Holsche, office boy	360
George A. Benjamin, planing-mill superintendent	1,200
George Martin, engineer	1,080
Four watchmen	1,800
H. Rotschild, book-keeper	1,200
Kurt, office boy, New York	360
L. J. Brush, logging supt. and inspector	900
H. Barker, chief shipping clerk	1,200
C. W. Simmons, secretary and treasurer	3,600
H. W. Simmons, salesman	1,200
Isadore Cohen, salesman	1,800
J. B. Murphree, salesman	1,800

The loss in consequence of the attachment by not being able to fill orders and contracts for lumber existing and pending October 1st, 1897, are as follows:

Contracts with Degnan McLean & Company, of New York city for fine quality of timber and lumber, loss as follows, to wit:

Loss of profits at about $4 per thousand on 483,000 feet, by not being able to deliver the same.

23 Also, loss of about $6,000, that sum being charged to L. Bucki & Son Lumber Company by said Degnan McLean & Company as the difference which that company had to pay for timber and lumber bought at retail in New York city to make up deficiences in deliveries, and the prices which L. Bucki & Son Lumber Company were to receive for same.

Contract with the Yellow Pine Lumber Company of New York City.

Loss of profits by not delivering 800,000 feet, about $4 per thousand. Also loss of about $10,000 charged L. Bucki & Son Lumber Company, or rather retained by said Yellow Pine Company, as the difference between the contract price of such timber and lumber, and the price which said Yellow Pine Company had to pay at retail in New York, to make up deficiencies in deliveries under the contract.

Contract with Sheppard & Morse Lumber Company of Boston, Mass.

Loss of profits by not delivering about 100,000 feet about $4 per thousand. Also loss of about $600, the difference which said Sheppard & Morse Lumber Company had to pay between the contract price and the market price of lumber to make up deficiencies in deliveries.

Contract with E. B. Hunting & Co., of Baltimore, Md.

Loss by not delivering 280,000 feet, to wit: Loss of difference between the contract price and the price said company had to pay in the market to make up deficiencies in deliveries, $1100.

And the defendant is hereby notified that at the trial of the cause the plaintiff will adduce, or offer to adduce, testimony establishing damages by way of demurrage on the schooner R. F. Hartley, $100, caused by the writ of attachment. Also expenses and disbursements made and incurred in preparing for the trial of the motions to dissolve the attachments, to wit: for monies paid and incurred in employing agents to ascertain whether or not it was practicable or possible for the Atlantic Lumber Company to obtain pine timber and pine logs sufficient in quantity, and sufficiently near to Jacksonville to enable the said The Atlantic Lumber Company to continue in the performances of their contract for the remaining period of three and one-half years, and to deliver logs of the description called for by the contract into the boom of the L. Bucki & Son Lumber Company at the price of $7.25 or $7.75 per thousand feet, board measure, called for by the contract, and make any profit thereon, such testimony being essential to rebut and overcome evidence adduced by the Atlantic Lumber Company to establish that it was able to con-
24 tinue in the performances of the contract, the amount so expended by L. Bucki & Son Lumber Company, being about $500.

We also give notice that we shall adduce testimony to establish the necessary expenditure of about $150 in correspondence by telegraph and by letter, which correspondence was necessary to prepare to try the motions to dissolve the attachment.

We shall also adduce testimony to prove damages by way of costs in obtaining forthcoming bonds, premium paid on the forthcoming bonds to the Fidelity & Deposit Company of Maryland, $1,000.

Also premium on insurance policies on mill plant, etc., during the time it was in possession of the sheriff, at the rate of $2,400 per year; taxes during like period, at the rate of about $800 per year; rent paid Joseph D. Mitchell and estate, at the rate of $400 per year, for the use of boom pen facilities; day and night watchman at the mill at $5 per day.

We shall also offer evidence of damages sustained by attorneys' fees paid and obligation to pay attorneys' fees in obtaining a dissolution of the attachments, and also damages to the credit of the plaintiff by reason of the attachments, and by reason of the fact that the issuing and levy of the attachments was published and given wide circulation in the newspaper mentioned in the declaration and other evidence to prove all items of damages stricken from the declaration by the order of the court.

H. BISBEE,
Attorney for Plaintiff.

Service of a copy of the foregoing notice and bill of particulars excepted (accepted) this 15th day of February, 1899.

R. H. LIGGETT,
Defendant's Att'y.

(Indorsed :) Bill of particulars and notice of offer of proof. Filed Feb. 16th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Now comes the plaintiff by H. Bisbee, its attorney, and without waiving any objection or exception to the order of the court on motion to strike out certain parts of the declaration in the above-entitled cause, that the words and matters stricken out in pursuance of the said order are as follows, to wit: the words "and without just cause" found in the 8th line of the 10th page of the record of the circuit court of the State of Florida, the same being in the second line of the fourth paragraph of the first count of said declaration. And the words "among other reasons" in the second line of the 13th page in said record, the same being in the fourteenth line of the sixth paragraph of said count. And the words "traveling expenses of the officers and agents of plaintiff, to attend court and preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out large sums of money as" and the words "and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and by reason of the said improper issuing of the said writ, and the levy thereof, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers," on the fourteenth page of the said record, and in the eighth paragraph of the first count herein.

And further, the words, "among which was the ground that said attachment suit was brought to recover unliquidated damages, to wit: the sum named in the contract sued on as a penalty for the breach thereof;" and the words "upon the testimony adduced by the said The Atlantic Lumber Company, and without any evidence being adduced by the plaintiff, at the said trial on the said motion and issues;" on the twenty-second and twenty-third pages of the said record, and in the sixth paragraph of the second count of said declaration. And the words "traveling expenses of the officers and agents of plaintiff, to attend court, and in preparing for the trial of the said motion to dissolve the said attachment; and has been compelled to pay out other large sums of money as" and the words "and attorneys' fees; and has been compelled to incur and has incurred valid obligations to pay other large sums of money, as attorneys' fees, the employment of attorneys being indispensably necessary to procure and obtain the dissolution of the said writ of attachment; and

by reason of the improper issuing of the said writ and the
26 levy thereof, as aforesaid, plaintiff was greatly injured in its credit, and for a long time was and is unable to carry on its business aforesaid, for want of credit, the said attachment proceedings having been published in daily newspapers of large circulation, to wit: in the Times-Union and Citizen and in the Metropolis, both being newspapers published in the said county of Duval, and in other papers;" on the twenty-third and twenty-fourth pages of said record, and in the eighth paragraph of the said second count.

H. BISBEE,
Attorney for Plaintiff.

Received a copy of the foregoing amendment Feb. 15, '99.

R. H. LIGGETT,
Def't's Attorney.

(Indorsed:) Amendment of declaration. Filed Feb. 16th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff, by H. Bisbee, its attorney, and moves to set aside the order heretofore made in this action, striking out from the declaration certain items of damages on the ground that the court erred in granting said order, and the items of damages stricken out are proper for the jury to consider.

H. BISBEE,
Att'y for Plaintiff.

Please take notice, that on Wednesday, the eighth day of March, 1899, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we shall call up the foregoing motion for disposition.

H. BISBEE,
Att'y for Plaintiff.

To Richard H. Liggett, Esq., attorney for defendant.

Service of the foregoing notice accepted this 27th day of February, 1899.

R. H. LIGGETT,
Att'y for Defendant.

(Indorsed:) Motion to set aside order, striking allegation from declaration. Filed Mar. 8th, 1899. E. O. Locke, clerk.

27 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Please take notice that in the bill of particulars heretofore filed in this cause, in the statement of losses in consequence of the attachment by not being able to fill orders and contracts existing and pending October 1st, 1897, the Degnan-McLean Construction Company was inadvertantly and erroneously styled Degnan McLean & Co., and on the twenty-first day of March, 1899, at ten o'clock a. m., or as soon thereafter as counsel can be heard, I shall apply to the court for leave to amend said bill of particulars by striking therefrom the words "Degnan-McLean & Company," wherever they occur, and inserting in place thereof the words "Degnan McLean Construction Company."

H. BISBEE,
Attorney for Plaintiff.

I hereby acknowledge service of the foregoing notice and consent that the amendment therein indicated may be made.

R. H. LIGGETT,
Counsel for Defendant.

(Indorsed:) Amendment to bill of particulars. Leave to file granted. James W. Locke, judge. Filed Mar. 23rd, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Now comes the defendant in the above-stated cause, The Fidelity and Deposit Company of Maryland, by D. U. Fletcher and R. H. Liggett, its attorneys and for a plea to the first count of the declaration of plaintiff herein says:

That as to so much of the said first count of said declaration as alleges that the attachment therein mentioned sued out by the Atlantic Lumber Company against the L. Bucki & Son Lumber Company was dissolved on the ground that there was not due on the

28 first day of October, 1897, from the L. Bucki & Son Lumber Company to the said The Atlantic Lumber Company a sum of money for which it could maintain the said attachment, it does not appear in and by the record in said cause that the said attachment was dissolved on the said ground stated in plaintiff's declaration, but it appears in and by the said record in said cause

that the said attachment was dissolved upon a preliminary motion for defects appearing upon the face of the proceedings, and without any hearing or determination of the merits; and the defendant as to the remainder of said first count of plaintiff's declaration alleges that the Atlantic Lumber Company on October 1st, 1897, at the time that the attachment in said count mentioned was sued out, did have a meritorious cause of action against the L. Bucki & Son Lumber Company for a sum of money authorizing the attachment to be sued out on said day, and the allegations stated in the affidavit for attachment filed in said cause as to the grounds existing for attachment were true, and the said attachment was not improperly sued out.

R. H. LIGGETT,
D. U. FLETCHER,
Attorneys for Defendant.

STATE OF FLORIDA, }
Duval County. }

Before me, the undersigned, a notary public in and for the State of Florida at large, personally came, within the county of Duval and State of Florida, —— —— who, being by me duly sworn, says that he is the agent of the Fidelity and Deposit Company of Maryland, and makes this affidavit in its behalf, that he has read the foregoing plea, and that the allegations therein contained are true, as he is informed and believes.

R. BOWEN DANIEL.

Sworn to and subscribed before me this 15th day of April, 1899.

JNO. W. DODGE,
[SEAL.] *Notary Public, State at Large.*

(Indorsed:) Amended plea to 1st count of declaration. Filed April 15th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff, }
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant. }

Now comes the defendant in the above-stated cause, The
29 Fidelity and Deposit Company of Maryland, a corporation, by R. H. Liggett and D. U. Fletcher, its attorneys, and for a plea to the declaration of the plaintiff filed herein, and to each count thereof, says that the plaintiff was not damaged as in the said declaration alleged.

R. H. LIGGETT,
D. U. FLETCHER,
Attorneys for Defendant.

STATE OF FLORIDA, }
Duval County. }

Before me, the undersigned, a notary public in and for the State of Florida at large, personally came, within the county of Duval and State of Florida, R. Bowen Daniel who being by me duly sworn says that he is the agent of the Fidelity and Deposit Company of Maryland and makes this affidavit in its behalf, and that the foregoing plea is true as he is informed and believes.

R. BOWEN DANIEL.

Sworn to and subscribed before me this 22nd day of April, 1899.

ERNEST C. BIXLER,
[SEAL.] *Notary Public, State at Large.*

(Indorsed:) Plea of *non damnificatus*. Filed Apr. 24th, 1899. E. O. Locke, clerk, by Louis Starke, deputy.

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY }
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND. }

This cause coming on to be heard upon the plaintiff's demurrer to the defendant's amended plea, filed April 15th, 1899, to the first count of the declaration, and having been fully heard, it is ordered that said demurrer be sustained.

Done and ordered in open court this 28th day of April.

JAMES W. LOCKE, *Judge.*

(Indorsed:) Order sustaining demurrer to defendant's amended plea to declaration. Filed Apr. 28th, 1899. E. O. Locke, clerk, by Louis Starke, deputy.

30 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff, }
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant. }

Comes now the plaintiff by H. Bisbee, its attorney, and takes issue upon the plea of defendant filed on the 24th day of April, 1899.

H. BISBEE,
Attorney for Plaintiff.

(Indorsed:) Joinder of issue upon plea of *non damnificatus*. Filed Apr. 28th, 1899. E. O. Locke, clerk.

In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

Comes now the plaintiff, by H. Bisbee, its attorney, and by way of amendment to its bill of particulars hereinbefore filed, says that its loss upon the contract with E. B. Hunting & Co. of Baltimore, Md., mentioned in said bill of particulars, by not delivering 280,000 feet of lumber, is confined to the loss of profits plaintiff would have made by the performances of said contract by delivering said lumber, amounting to the sum of, to wit: $1,100.

H. BISBEE,
Attorney for Plaintiff.

Received a copy of the foregoing amendment, May 3rd, 1899.
R. H. LIGGETT,
Attorney for Defendant.

(Indorsed:) Amendment to bill of particulars. Filed May 3rd, 1899. E. O. Locke, clerk.

31 In the Circuit Court of the United States, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

The defendant will please take notice that at the trial of this action, we shall offer in evidence, and insist upon proving the following items of damages:

First. All monies necessarily paid out for counsel and attorneys' fees, for services in preparing motions to dissolve the attachments, and in preparing for the trial of the said motions, and in the trial of the said motions, which services were caused by and were in consequence of said writs of attachment. Also reasonable compensation for the services of attorneys-at-law employed as above, which have not been paid, which services were caused by and in consequence of said writs of attachment. And we shall offer evidence to prove the value of the services of the said attorneys-at-law in the circuit court of the United States for the southern district of Florida, in the United States circuit court of appeals for the fifth circuit, and in the Supreme Court of the United States, in resistingthe attempts and efforts of the Atlantic Lumber Company and the said defendant to arrest and vacate the judgments of the said circuit court dissolving said attachments. The period of the time covered by such services was from the fourth day of October, 1897, to the 8th day of June, 1899.

Second. Plaintiff at the trial of said action will offer evidence to

prove, and insist upon proving, that the said writs of attachment were levied upon substantially all the property and assets of the plaintiff, to wit: its mill properties, manufactured timber and lumber, and logs in its boom in Jacksonville, Florida; and that in consequence of the levies of the said writs upon the said properties, the plaintiff's ways and means of continuing in business were taken away from the possession and control of the plaintiff, and the plaintiff was thereby deprived and prevented from carrying on its business of manufacturing and selling hard-pine lumber from the first day of October, 1897, to the 8th day of June, 1899. And we shall offer evidence to prove, and insist upon proving, that in consequence of the levies of said writs of attachment upon all the said properties, it was impossible or impracticable for the plaintiff to obtain the necessary money or credit upon which to do any business for the entire period above mentioned; and to that extent the plaintiff will
32 offer evidence to prove and insist upon proving the injury and damage to its credit as the direct consequence of the levy of the said writs upon the properties aforesaid.

Third. The plaintiff will offer evidence to prove and insist upon proving at the trial of said action, all payments of money actually made, or obligations actually incurred in necessary prevailing (prevailing) expenses of the plaintiff's officers and agents in preparing for the dissolution of the said attachments, and in obtaining a dissolution of the same, and that such expenses and obligations were necessarily incurred as the direct consequence of the levy of the said writs of attachment; and all moneys paid out and obligations incurred in traveling expenses of the attorneys of the plaintiff, and in printing of briefs, and motions, and other papers in accordance with the rules of court, necessary to properly resist the attempts and efforts of the defendant and the Atlantic Lumber Company to reverse the said judgments dissolving the said writs of attachment in the United States circuit court of appeals for the fifth circuit, and the Supreme Court of the United States; and for services of attorneys-at-law rendered in resisting the efforts of the said defendant and the said The Atlantic Lumber Company to have the circuit court of Duval county proceed with the trial of the suits of the Atlantic Lumber Company against the plaintiff in the summer of 1899, and to resist attempts of the defendant and the said The Atlantic Lumber Company to obtain a writ of mandamus from the supreme court of Florida to compel the said circuit court of Duval county to proceed with the trial of the said action, in the summer of 1899, and after the circuit court of appeals aforesaid had affirmed the judgment, and denied the motions of the Atlantic Lumber Company to remand the case for want of jurisdiction, and after the Supreme Court of the United States had denied the application of the said The Atlantic Lumber Company to review the said judgments dissolving the said attachments on writ of certiorari to the said circuit court of appeals.

And you will further take notice that at the hearing of the motion to restore to the declaration certain matters heretofore stricken out, plaintiff will ask the court to order that the said items of damages may be taken and considered as a part of the declaration and each

count thereof; and at the same (time) we shall ask for leave to strike from the declaration any definite limit of time during which damage resulted to the plaintiff in consequence of said attachments.

H. BISBEE,
Attorney for Plaintiff.

Service of the foregoing notice accepted this 9th day of January, 1900.

R. H. LIGGETT,
Attorney for Defendant.

33 (Indorsed:) Notice of offer of proof of damages. Filed Jan. 17th, 1900. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

THE L. BUCKI & SON LUMBER CO.
vs.
THE FIDELITY & DEPOSIT CO. OF MARYLAND.

On Declaration.

This cause coming on to be heard upon the motion to restore to the declaration all clauses and paragraphs heretofore stricken out, and having been fully heard and argued by counsel and having been duly considered, it is ordered that such matters be so far restored as to permit testimony to be introduced upon the questions of damages resulting from counsel fees and loss of credit, subject to any subsequent ruling and charge of the court to the jury.

JAMES W. LOCKE, *Judge.*

Jacksonville, Fla., Jan'y 19th, 1900.

(Indorsed:) Order on motion to restore to the declaration certain clauses and paragraphs. Filed Jan. 25th, 1900. E. O. Locke, clerk, by Louis Starke, deputy.

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER CO.
vs.
THE FIDELITY & DEPOSIT CO. OF MARYLAND.

We, the jury, find for the plaintiff and assess its actual damages, exclusive of attorneys' fees, at $10,880.00.

And if the court should be of the opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7500.00, as a reasonable and just fee for the services proven.

WM. MICKLER, *Foreman.*

(Indorsed:) "Verdict. Filed Feb. 2nd, 1900." E. O. Locke, clerk.

34 *Defendant's Assignments of Error.*

In the United States Circuit Court for the Southern District of Florida.

THE L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

The Fidelity and Deposit Company of Maryland, by its attorney, assigns the following errors to the rulings and decisions of the circuit court herein.

First. The court erred in refusing to strike out on defendant'- motion all allegations appearing in each count of the declaration, relative to the business in which plaintiff was engaged, and to damages sustained by it in that business, by reason of the issuance and levy of the writs of attachment.

Second. The court erred in refusing to strike out on defendant's motion all allegations in each count of the declaration, in relation to damages sustained by the plaintiff in consequence of its inability to perform contracts with third persons and to fill orders for manufactured timber, and lumber, in consequence of the levy of writs of attachment.

Third. The court erred in refusing to strike out on defendant's motion the allegations contained in the second count of the declaration as to the plaintiff being engaged in business by the use of the property levied upon under the writ of attachment, and that its business was interrupted, hindered and destroyed and ruined by reason of the levy of said writ.

Fourth. That the court erred in refusing to strike out on defendant's motion, all allegations appearing in each count of the declaration, stating that the allegations appearing in plaintiff's affidavits as to the special grounds for attachment in the cause therein referred to, were false and untrue.

Fifth. That the court erred in sustaining the demurrer to the defendant's plea to the first count of the declaration, filed herein, on April 15th, 1899, wherein the defendant alleged that it did have a meritorious cause of action against the plaintiff for the amount of nine thousand nine hundred and eighty and 80 / 100 ($9,980.80) dollars, and that the allegations for attachment made in the cause in said count mentioned, were true and the said attachment was not improperly sued out, and that it did not appear from the record that the attachment was dissolved on the ground specified in the declaration and that the said attachment was dissolved on a preliminary motion and without a hearing on the merits.

35 Sixth. That the court erred in refusing to permit the defendant on April 24th, 1899, to file a plea traversing certain special allegations of the declaration, which are fully stated in the plea which is contained in the bill of exceptions herein.

Seventh. That the court erred in admitting evidence tending to

show that on October 1st, 1897, the plaintiff was negotiating a contract for the loan of money and sale of lumber with Sheppard-Morse Lumber Company, and in admitting testimony tending to show that the consummation of such contract was prevented by the attachment.

Eighth. That the court erred in permitting the plaintiff to prove that on October 1st, 1897, it had a certain contract with the Yellow Pine Lumber Company for the sale and delivery to it of all the timber and one-quarter of the boards manufactured by the plaintiff during the year 1897.

Ninth. The court erred in admitting evidence to the effect that the plaintiff gave a forthcoming bond for the property attached, and paid the surety company $750.00 for becoming surety thereon.

Tenth. The court erred in permitting the witness Charles L. Bucki to testify over the objection of the defendant, that the profits derived from the operation of the mill were $8,722.40 in March, 1897; $9,966.00 in April; $8,154.48 in May; $3,269.81 in June; $5,607.48 in July; $1,932.12 in August and $422.00 in September, 1897.

Eleventh. The court erred in admitting evidence of the execution of a mortgage by the plaintiff to the Fidelity and Deposit Company of Maryland, whereby plaintiff mortgaged its mill plant to said Fidelity and Deposit Company, to secure it against loss as a surety on the forthcoming bond of the plaintiff, and in admitting evidence to the effect that such mortgage was not satisfied till June 6th, 1899.

Twelfth. That the court erred in permitting the plaintiff to prove the amount of lumber manufactured by plaintiff at its mill between October 1st, 1896, and October 1st, 1897.

Thirteenth. That the court erred in permitting the plaintiff to prove that on October 1st, 1897, it had a number of officers in its employ, who were employed by the year at salaries which aggregated fifteen thousand dollars ($15,000.00) and that the year of each of said employés expired in April, 1898.

Fourteenth. That the court erred in permitting the plaintiff to prove that it had in its employ four watchmen to each of whom it paid one dollar per day, and that these watchmen watched the mill property during the whole time that the lien of the attachment remained on the property.

36 Fifteenth. The court erred in sustaining the plaintiff's objection to the following question propounded by the defendant to Charles L. Bucki, president of the plaintiff company.

"Q. What application was made of the proceeds of this lumber, that was sold from the mill, after October 1st, 1897?"

The purpose of the question being to show that the plaintiff made use of the money immediately on its receipt and that they were not embarrassed in its use by reason of the forthcoming bond.

Sixteenth. That the court erred in refusing to exclude from the consideration of the jury, all testimony in regard to plaintiff's having certain employés in its employ, on annual salaries, on October 1st, 1897.

Seventeenth. That the court erred in giving the following instruction to the jury:

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties, caused by these attachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill property in consequence of the attachment, because, as the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business even if attachments had not been issued and levied. This is a question of fact for you to determine upon all the evidence in the case, and if you believe from all the evidence in the case that if these attachments had not been issued and levied upon the plaintiff's properties, it, the plaintiff, would have been able to have continued in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained as a direct and proximate consequence of these attachments."

Eighteenth. That the court erred in giving the following instruction to the jury:

"Another element of damages claimed by the plaintiff is that the attachment interrupted its business and by such interruptions and the consequences thereof, resulting from the attachments, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff agreed to furnish prior to October 1st, 1897; that such losses consist of certain amounts the purchasers of the lumber had to pay to supply what they had purchased of plaintiff, in excess of the price they had agreed to pay the plaintiff. The court instructs you that the defendant is liable for all such losses if any resulted as a direct consequence of the attachments."

37 Nineteenth. That the court erred in giving the following instruction to the jury:

"The jury are the exclusive judges as to the effect of the writs of attachment upon the business of the plaintiff, that is to say, when you consider any item of damages in this case, you are the sole judges as to whether the writs of attachment and the levy of the same, directly and approximately caused the damage or injury, or whether there was some other intervening cause of the damage or injury, independent of the attachment, that would have caused the damage if the attachment had not been issued."

Nineteenth and one-half exception. That the court erred in withdrawing from the consideration of the jury the testimony to the effect that the market price of lumber was better after October 1st, 1897, than prior thereto.

Twentieth. That the court erred in giving the following instruction to the jury:

"It is the province and right of the jury to decide from the evidence whether or not these writs of attachment defeated and prevented the carrying out and performance of any contract with Sheppard-Morse & Company, for the loan of money or for the de-

livery of lumber, and damages sustained by the plaintiff by such non-delivery, and it is your right and duty to decide upon the evidence whether or not these writs of attachment prevented the plaintiff from delivering any lumber to the Degnen-McLean Company or E. B. Hunting & Company, which plaintiff prior to October 1st, 1897, had contracted to deliver, and if you find such prevention of deliveries toward such damages as the evidence justified.

Twenty-first. That the court erred in giving the second paragraph of the following charge, given to the jury by the court:

"You *the* the exclusive judges as to the facts of this cause, you are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequence of the issuing and levying of these writs of attachment.

These damages consist of two general consequences:

1st. All moneys paid out and all expenses incurred in and about and attending to the preparation of the trial of the motions to dissolve the attachments and on the trial of such motions which become reasonably necessary as a direct consequence of such attachment.

2nd. All consequential damages, that is all damages caused by the interruption of the plaintiff's business, either by disabling
38 the plaintiff from operating its mill or disabling it to deliver timber and lumber it had agreed to deliver prior to October 1st, 1897, if you believe from the evidence that the direct and proximate effect of such attachments caused such interruption of the plaintiff's business."

Twenty-second. That the court erred in refusing to give the following instruction to the jury at the request of the defendant:

"The court instructs the jury that they shall allow the plaintiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1st, 1897, if such inability was due to the fact that the plaintiff was unable to buy the logs from which to cut said lumber."

Twenty-third. That the court erred in refusing to give the following instruction to the jury at the request of the defendant:

"The court instructs you that the plaintiff has produced no evidence to show any injury done to the lumber and logs seized by the sheriff under the writs of attachment, or that it was sold for any less by reason of the attachments, than it might have been sold for, and you are, therefore, instructed that you shall allow the plaintiff no damages on account of the seizure of the logs, lumber and other personal property."

Twenty-fourth. That the court erred in giving the following instruction to the jury:

"Another point is the damage claimed for the salaries of the officers and employés of the Bucki Lumber Company for the time of the enforced idleness, that is the time they continued on salaries and on account of the granting of the writs of attachment, they were suspended from active operations. You have heard the testimony upon that; and you will determine just how far the Bucki Company suffered in damages on account of the time that their em-

ployés were compelled to remain idle and earned nothing, although they were obtaining wages."

Twenty-fifth. That the court erred in refusing to give the following instruction to the jury at the request of the defendant:

"The jury are instructed that the injury in regard to the loss of time by the employés shall be limited to the period between October 1st, 1897, and October 11th, 1897, and that no damages can be allowed for any time lost by plaintiff's employés after October 11th, 1897."

Twenty-sixth. That the court erred in refusing to give the jury the following instruction at the request of the defendant:

"The court instructs the jury that they cannot find any damages for the plaintiff on account of the loss of the time of its em-
39 ployés unless they find from the evidence that the time of some of the employés was actually lost on account of the levy of the writ of attachment, and if the jury should find from the evidence that any time found to have been lost by the employés would have been lost even though no attachment had been levied, then they shall find no damages for the plaintiff on account of such lost time."

Twenty-seventh. That the court erred in refusing to give the following charge to the jury at the request of the defendant:

"If the jury finds from the evidence that the period of seven working days would have been lost in November if it had not been lost in October, and that the mill ran seven days longer in November than it would have done had the shut-down in October not occurred, then you shall find no damages for the plaintiff on account of such shut-down."

Twenty-eight. That the court erred in refusing to give the following instruction to the jury at the request of the defendant:

"If the jury find from the evidence that the plaintiff manufactured as much lumber after October 1st, 1897, as it would have done had no shut-down occurred in October, then they shall find no damages for the plaintiff, on account of such shut-down."

Twenty-ninth. That the court erred in giving the following instruction to the jury:

"The evidence in this case shows that after ten days there was a forthcoming bond given to the sheriff and the plaintiff in this case assumed all the risk and responsibility of taking possession of that property. The first bond permitting them to go to work was given on the 11th of October, and there was a million and a half feet of lumber released from this attachment. On the 4th of November, there was a forthcoming bond, releasing all the rest of the mill and the property.

"Now, as I say the plaintiff contends, that as this case continued, this question of attachment continued: that it was suffering under the attachment, the lien of the attachment until the sixth day of June, 1899, when finally the action of the Supreme Court of the United States became conclusive and these attachments were finally determined beyond further question. That is the contention of the plaintiff; they claim damages by the interference of these writs of

attachment, for this entire time from the first of October, 1897, up to the 6th of June, 1899.

"The defendant contends that plaintiff having taken possession of the property, used it, sawed it up, used their mill, leased
40 their mill, and used their lumber, sawed their lumber, filled their contracts as far as they saw fit, and that the contention of the plaintiff is not sound or is not just under the law; I instruct you in regard to that point that although the plaintiff in this case took possession of that property, there was hanging upon that possession, the risk which it assumed that it might be compelled to return the property, because it could be compelled to do so; it had the right when it took possession, but in doing so, it became liable for any amount which might be pronounced in those attachment suits and the sheriff could look to it. The important question is this: How much damage did the plaintiff suffer by having that attachment bond and the levy of that attachment hanging over it, although it was using and disposing of its property. That is the most difficult question for you to determine. If you can determine from the testimony of the value of the property as has been stated and all the facts and circumstances that are in the testimony, it will be for you to say and determine such damages.

"Notwithstanding the possession and use of the property, the plaintiff has asked that interest upon the value of the lumber be allowed them, the value of the lumber for the entire time be allowed them as if they had not taken possession of it, had not used it. I instruct that the plaintiff was not bound to give a forthcoming bond and take possession of the property, but it did it voluntarily and the question is what has been the damage with the hanging lien and the risk it assumed for that time?"

Thirtieth. The court erred in giving the following charge to the jury:

"Property, the possession of which is held by virtue of a bond given in the course of a judicial proceeding and process issued thereon, is held upon the process of the law. No change in the title is effected. If the person so holding parts with its possession, he does it at his peril."

Thirty-first. The court erred in giving the following charge to the jury:

It was not the duty of the plaintiff to give forthcoming bonds or indemnity bonds to the sheriff or the plaintiff in the attachment suit.

Thirty-second. The court erred in giving the following instruction to the jury:

The giving of the forthcoming bonds did not discharge the lien of the attachments upon the property attached and the plaintiff after obtaining the possession of the logs and lumber and timber, levied on, could not sell and dispose of the same and give a
41 good title to the purchaser free and clear of the attachment liens without assuming any risk of the property being demanded or damages being entailed.

Thirty-third. The court erred in giving the following instruction to the jury:

After giving the forthcoming bonds for the personal property, to wit: logs and lumber levied upon, the plaintiff held such property as bailee for the sheriff and was bound to deliver such property back into the sheriff's possession whenever such sheriff demanded the possession of such property for the purpose of enabling the sheriff to sell the same to satisfy any judgment the court might render in the attachment suits.

Thirty-fourth. That the court erred in giving the following instruction to the jury:

"If the plaintiff sold such personal property after giving such forthcoming bonds, in comtemplation of law, the plaintiff held the proceeds of such sales in its hands, and has the legal right to hold such proceeds in its hands to pay any judgment that might thereafter be recovered against it in the suits in which the attachments were issued, until such lien of the attachments ceased to exist."

Thirty-fifth. That the court erred in giving the following charge to the jury:

"The court instructs you to award damages to the plaintiff which it sustained by reason of or in consequence of the levy of the attachments upon all the timber and lumber and logs attached, and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber, lumber and logs, considering any deduction from such damages from the fact that the forthcoming bonds or indemnity bonds were given by the plaintiff."

Thirty-sixth. That the court erred in giving the following instruction to the jury:

"It is your province and duty to determine under the evidence the length of time this attachment lien remained upon and continued operative upon the property attached."

Thirty-seventh. The court erred in giving the following instruction to the jury:

"If you are satisfied in your minds what the testimony will justify, it is not absolutely necessary for you to find a positive amount of damages, if you are satisfied that such damages and such amounts have been fully proven. It is not necessary that an actual positive amount be determined by you to a mathematical certainty or nicety."

Thirty-eighth. That the court erred in giving the following instruction to the jury:

"You will allow the plaintiff interest at eight per centum per annum upon every item of damage which you find the plain-
42 tiff sustained from the time you find such damage- were sustained to the date of your verdict."

Thirty-ninth. The court erred in giving the following instruction to the jury:

The subject of indebtedness of plaintiff incurred after October 1st, 1897, and the subject of giving a mortgage upon its properties in

February, 1898, is wholly immaterial in this case and you will exclude the same from your consideration.

And the Fidelity and Deposit Company of Maryland prays that the judgment herein rendered against it may be reversed, and a new trial directed.

R. H. LIGGETT,
Attorney for Fidelity & Deposit Company of Maryland.

(Indorsed:) No. 116. In the United States circuit court for the southern district of Florida. L. Bucki & Son Lumber Company, *vs.* Fidelity & Deposit Company of Maryland. Assignment of error. Filed Mar. 17, 1900. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Be it remembered that on the fifth day of March, A. D. 1898, the L. Bucki & Son Lumber Company instituted a suit at law against the Fidelity & Deposit Company of Maryland, in the United States circuit court for the southern district of Florida, and afterwards on the third day of December, A. D. 1898, at a term of said court held at Jacksonville, in said district, the defendant, by its attorney, submitted a motion in said cause to the said court, to strike out of each count of the declaration all allegations appearing therein, relative to the business in which the plaintiff was engaged, and the damages sustained by it in that business by reason of the issuance and levy of the writs of attachment, but the court did refuse to grant the said motion, to which the defendant did then and there except, and this constitutes the defendant's first exception.

Second exception. And on the same day the defendant, by its attorney, moved the said court to strike out of each count of the declaration herein, all allegations relative to damages sustained by the plaintiff in consequence of its inability to perform contracts with third persons and to fill orders for manufactured timber and
43 lumber in consequence of the levy of the writ of attachment, but the said judge denied the said motion, to which action the defendant did then and there except.

Third exception. And on the same day the defendant, by its attorney, moved the court to strike out of the second count of the declaration, all allegations therein contained, relative to the plaintiff being engaged in business by the use of the property levied upon under the writ of attachment, and that its business was interrupted, hindered, destroyed and ruined by reason of the said writ, but the said court denied the said motion, to which action the defendant did then and there except.

Fourth exception. And on the same day the defendant, by its attorney, moved the court to strike out of each count of the declaration all allegations appearing therein, stating that the allegations

appearing im plaintiff's affidavits as to the special grounds for attachment in the cause therein referred to were false and untrue, but the court denied the said motion, to which action the defendant did then and there except.

Fifth exception. And afterwards, on April 24th, 1899, at a term of said court, the defendant applied to the court for leave to file the following traverse of certain allegations of the declaration, which application was by the court denied, and to said denial the defendant did them and there except, the said traverses being in the words and figures following, to wit:

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, a Corporation, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, a Corporation, Defendant.

Now comes the defendant in the above-stated cause, The Fidelity & Deposit Company of Maryland, by R. H. Liggett and D. U. Fletcher, its attorneys, and traversing certain material allegations of the first count of the plaintiff's declaration, says:

1. That it is untrue, as alleged in said count, that the Atlantic Lumber Company improperly caused the sheriff of Duval county, Florida, to levy on the property in said count mentioned, and take said property into his possession and custody for a long period of time, to wit: one month; and further traversing said allegation, the defendant alleges that the property in said count mentioned
44 was only taken into the possession and custody of the said sheriff for a period of ten days, and that, to wit: on October 11th, 1897, all of the said property was by the said sheriff released from his possession and custody and delivered and restored to the defendant.

2. That it is untrue, as alleged in said declaration, that each of the allegations in the said affidavit for attachment stating the existence of special statutory grounds for attachment were false and untrue when made; and the defendant hereby traverses and denies all the allegations of said count stating that the special statutory grounds for attachment in said affidavit set forth did not exist.

3. That it is untrue, as alleged in said declaration, that by reason of the issuing and levy of the said writ of attachment the plaintiff's business was seriously injured for a long period of time, to wit: for six months, and that the plaintiff was thereby interrupted, hindered, delayed and obstructed in its business for the period of, to wit: six months and upwards, to the great injury and damage of the plaintiff; and the defendant hereby traverses and denies all of the said allegations.

4. That it is untrue, as alleged in said declaration, that the plaintiff, by reason of the premises therein set forth and the levy of said writ of attachment in said count stated, was put to great expense

and trouble in and about procuring the dissolution of said attachment, and compelled to pay out large sums of money for traveling expenses, and that it was damaged in other large sums in consequence of the said writ and levy, by not being able to perform contracts and fill orders for manufactured timber and lumber; and the defendant hereby traverses and denies all of said allegations.

And the defendant traversing certain material allegations of the second count of the plaintiff's declaration, says:

1. That it is untrue, as alleged in said declaration, that the Atlantic Lumber Company improperly caused the sheriff of Duval county, Florida, to levy on the property in said count mentioned, and to take all of said property into his possession and custody and to deprive the plaintiff of the possession and use thereof for a long period of time, to wit: for six months; and the defendant hereby traverses and denies all of the said allegations.

2. That it is untrue, as alleged in said declaration, that each of the said allegations in the said affidavit for attachment stating the existence of special statutory grounds for attachment were false and untrue at the time they were made, and made without just cause; and the defendant hereby traverses and denies all of the said allegations of the said count stating that the special statutory grounds for attachment in said affidavit set forth did not exist.

3. That it is untrue, as alleged in said declaration, that by reason of the issuing and levy of the said writ of attachment the plaintiff's business was destroyed and ruined for a long period of time, to wit: for six months, and that the plaintiff's business was wholly lost to it, and that the plaintiff by the reason aforesaid was interrupted, hindered and delayed and obstructed in its said business for the period of, to wit, six months and upwards, to the great damage and injury of the plaintiff; and the defendant hereby traverses and denies all of the said allegations.

4. That it is untrue, as alleged in said declaration, that by reason of the premises therein stated, and the levying of the said writ of attachment in said count stated, the plaintiff was put to great expense and trouble in and about procuring the discharge and dissolution of the said writ of attachment, and compelled to pay out large sums of money for traveling expenses of the officers and agents of plaintiff to attend court, and in preparing for the trial of the motion to dissolve the said attachment, and was compelled to pay out other large sums of money as costs, and that it was damaged in other large sums of money by not being able in consequence of the said writ and levy thereof to perform contracts and fill orders for the manufacture of timber and lumber; and that it was damaged in other large sums of money, being compelled to pay the salaries of its officers and employés when idle, by reason of the said writ and levy; and the defendant hereby traverses and denies all of the said allegations.

R. H. LIGGETT,
D. U. FLETCHER,
Attorneys for Defendant.

STATE OF FLORIDA, }
Duval County. }

Before me, the undersigned, a notary public in and for the State of Florida at large, personally came, within the county of Duval, and State of Florida, R. Bowen Daniel, who, being by me duly sworn, says that he is the agent of the Fidelity and Deposit Company of Maryland for the purpose of making this affidavit; that he has read the foregoing traverses of various allegations of the declaration of the plaintiff filed in this cause; and that the said traverses are true as he is informed and believes.

R. BOWEN DANIEL.

Sworn to and subscribed before me this 24th day of April, 1899.

ERNEST C. BIXLER,
[SEAL.] *Notary Public, State at Large.*

46 (Indorsed:) Traverse of certain allegations of declaration. Application to file denied, April 24th, 1899. J. W. Locke, judge.

And afterwards on the — day of January, 1900, the said cause came on to be tried before the said court, and a jury was duly sworn and impaneled to try the issues between the plaintiff and defendant, and during the course of said trial, the plaintiff offered evidence tending to prove that on October 1st, 1897, it had a certain contract with the Yellow Pine Lumber Company, for the sale and delivery to it of all the timber and one-quarter of the boards manufactured by the plaintiff during the year 1897, and the defendant did object to the introduction of the said evidence on the grounds that it was immaterial, and that any damage resulting to the plaintiff by reason of said contract, were too remote to be attributed to the attachments. But the court admitted the said evidence and allowed the plaintiff to prove that on October 1st, 1897, the plaintiff had a contract with the Yellow Pine Lumber Company for the sale and delivery to it of all the timber and one-quarter of the boards manufactured by the plaintiff at its mill during 1897, to which ruling the defendant did then and there except, and this constitutes the defendant's sixth exception.

Seventh exception. And during the course of the said trial, the plaintiff offered evidence tending to prove that on the 1st day of October, 1897, there were negotiations pending between it and the Sheppard-Morse Lumber Company, for the loan of the sum of $25,000 to the plaintiff, to be secured by a mortgage upon the plaintiff's mill plant, and boards thereafter to be manufactured by the plaintiff at its said mill, and that the said boards so manufactured were to be purchased by the said Sheppard-Morse Lumber Company, for a period of three years, at the rate of 1,000,000 feet per year, at the then existing market price, and the proceeds thereof, applied to the liquidation of said loan, and there was evidence tending to show that the levy of the writs of attachment prevented the carrying out of said contract; and the defendant objected to the admission of the said testimony on

the ground that it was immaterial and irrelevant, to the issues in the case and that any damages that may have been sustained by the plaintiff, in consequence of the said contract, not being consummated, were too remote to be recovered in this suit, but the said court did then and there overrule the said objection, and permitted the plaintiff to prove the substance of its said offer, to which ruling of the court the defendant did then and there except.

47 Eighth exception. And thereupon, afterwards, on the trial of said cause, the plaintiff proved that it had executed a forthcoming bond in the sum of $100,000 for the property levied on and offered to prove by Charles L. Bucki, a witness for the plaintiff, that the plaintiff had been compelled to pay a premium of $750.00 to the surety which executed said bond; to the introduction of which testimony the defendant by its attorneys did then and there object on the ground that the amount of such premium could not be recovered in this suit, and because it was not claimed in the pleadings herein; but the court did overrule such objection upon the ground that said expense was a general damage that would necessarily be contemplated by the defendant and permitted the plaintiff to prove that on November 4th, 1897, it gave a forthcoming bond in the amount of $100,000 to release the personal property levied on and that it was compelled to pay the sum of $750.00 in order to procure a surety on said bond, to which ruling of the court the defendant did then and there except.

Ninth exception. And during the further progress of the case, the plaintiff offered to prove by Charles L. Bucki, a witness therein, what the profits of the plaintiff's mill had been between March 1st, 1897, and October 1st, 1897; to the introduction of which testimony the defendant by its attorneys did then and there object on the grounds that it was immaterial and because neither injury to business or loss of profits could be recovered in this suit, and on the further ground that the profits made prior to October 1st, 1897, was no proper criterion of what might be made after that time; but the court overruled such objection and permitted the witness to testify that during such period the profits of saw-mill had been as follows: $8,722.40 for March; $7,966 in April; $8,154.48 in May; $3,269.81 in June; $5,067.48 in July; $1,932.12 in August; and $422.00 in September, to which ruling of the court the defendant did then and there except.

Tenth exception. And during the further progress of the trial, the plaintiff offered to prove that on November 4th, 1897, it executed a mortgage on its mill to the Fidelity and Deposit Company of Maryland, to secure it as surety upon a forthcoming bond in the amount of $100,000, given to secure the release of the logs and lumber levied on, and that the lien of said mortgage was not released until June 6th, 1899, and to the admission of such testimony the defendant did then and there object on the ground that it was incompetent and immaterial, but the court overruled the said

48 objection and admitted the said testimony to which ruling the defendant did then and there except.

Eleventh exception. And during the further progress of the trial

the plaintiff offered to prove the amount of lumber sawed by its mill in each month from October 1st 1896, to October 1st, 1897; to the admission of which evidence the defendant did then and there object on the ground that the same was immaterial and because the same was incompetent for the purpose of establishing a claim against the defendant for damages, but the court did overrule the objection and permitted the plaintiff to prove the amount of lumber it had manufactured monthly between October 1st, 1896, and October 1st, 1897; to which ruling of the court the defendant did then and there except.

Twelfth exception. And during the further progress of the trial the plaintiff having first proved that the sheriff levied the writs of attachment upon and took possession of the plaintiff's logs on October 1st 1897, at 6 o'clock p. m., and held possession of them until October 11th, or seven working days when he surrendered possession of them to the plaintiff to be sawed up into lumber, and it having also been first established that these logs had been furnished to the plaintiff by the Atlantic Lumber Co., and that on October 1st, 1897, and until the present time, the plaintiff was indebted to the defendant in the sum of $8,000 and upwards on account of the purchase price of said logs, and it having also been established that the saw-mill was a fixture and that the sheriff did not take it into his possession but levied on it as real estate, and it having been likewise established that the plaintiff resumed the running of its mill on October 11th, 1897, and continued running it until plaintiff had sawed up all the logs which it had on hand and that it could purchase in the market; he the plaintiff offered to prove that it had various persons employed by the year in connection with its business of manufacturing lumber, and that the period of their service dated from April 1st, 1897; and the defendant did then and there object to the admission of said testimony on the grounds that the same was immaterial and that any damages resulting to the plaintiff by reason of such fact were too remote to be recovered in the suit on the bond; but the court overruled the objection of the defendant and permitted the plaintiff to prove that on October 1st, 1897, the plaintiff had in his employ a superintendent of its mill at an annual salary of $2500.00, a president at an annual salary of $5,000.00, a planing-mill superintendent at an annual salary of $1500.00;
49 an auditor at a salary of $1200.00 per year; a secretary and treasurer at a salary of $3,000.00 per year, two stenographers, one at a salary of $1,000, and another at a salar of $720 per year; a book-keeper at a salary of $1200.00 per annum; two salesmen at a salary of $600.00 per annum, and that these parties had been employed April 1st, 1897, for the period of a year, to which ruling of the court the defendant did then and there except.

Thirteenth exception. And during the further trial of the cause, it having been claimed by the testimony of the defendant and admitted by the plaintiff that the saw-mill plant of the plaintiff was a fixture or a part of the realty, and it having been established that the sheriff did not take the same into his possession, but levied the writ of attachment upon it according to law, the plaintiff offered to prove

by one C. L. Bucki that during the time the mill was under attachment it employed four watchmen to watch the mill, whom plaintiff paid $75.00 per week; and the defendant did then and there object to the admission of said testimony on the ground that the same was immaterial and on the further ground that the sheriff had not *been* taken possession of the mill, but the court overruled the objection and permitted the witness to testify that the plaintiff employed four watchmen at an expense of seventy-five dollars per week who watched the mill during the time the lien of the attachment was upon it to which ruling of the court the defendant did then and there except.

Fourteenth exception. And during the further progress of the trial, it having been established by the evidence, that the logs and lumber levied on were soon thereafter surrendered to the plaintiff, in consequence of the execution of forthc-ming bonds, therefor, and that part of the lumber on hand and that manufactured from the logs was soon thereafter sold by the plaintiff, the defendant propounded the following question to one Charles L. Bucki, a witness at said trial:

"What application was made of the proceeds of this lumber that was sold from the mill after October 1st, 1897?"—for the purpose of showing that the plaintiff made use of the money received for the lumber immediately upon its receipt and without embarrassment on account of the forthcoming bonds, but the court sustained an objection to said question on the ground that it was immaterial, to which ruling of the court the defendant did then and there except.

14½. And during the progress of the trial the plaintiff introduced testimony to the effect that on October 1st, 1897, it had a number of officials in its employ, upon an annual salary aggregating $15,000 and it was further established by the testimony that the mill did not run between October 1st, 1897, and October 11th, 1897, and that on the 16th day of November, 1897, the mill finally closed down for want of logs to saw, and that the defendant prior to December 28th, 1897, sold all of the lumber which it had had on hand December 1st, 1897, and which it subsequently manufactured, and had shipped the same away from the mill except about two million feet which was on the 28th day of December, 1897, seized under writs of attachment issued by other creditors of the plaintiff, but which said lumber was included in the forthcoming bond, and it was further established by the evidence that the year of each of the said employés expired April 1st, 1898, and there was no testimony to show that the plaintiff had sustained any damages by reason of the said employés remaining idle during the time the mill was shut down for seven working days in October, 1897, further than the fact that they were on salary during such time; and thereupon after the plaintiff and defendant had completed the taking of further testimony, the plaintiff moved the court to exclude all of the testimony in regard to the plaintiff's having certain employés in its employ on annual salary, and withdraw said testimony from the consideration of the jury, on the grounds following:

First. Because the said testimony failed to establish any legitimate claim for damages against the defendant.

Second. Because damages growing out of the fact of the employment of these employés, if any were sustained, were too remote to be recovered in the suit on the bond.

Third. Because said testimony failed to show that the plaintiff could have made use of the services of its said employés even though no attachment had been issued.

Fourth. Because the mill manufactured the average monthly quantity of lumber in October, 1897, and it appears that the plaintiff got substantially the same amount of services as in other months.

Fifth. Because the mill finally shut down November 16th, 1897, within the year for which these employés were employed, and ten days later than it would have shut down, but for the shut-down in October, 1897.

But the court denied the said motion of the defendant, to which action the defendant did then and there except.

And the evidence adduced at the trial established the following facts:

That the plaintiff had about 3,000,000 feet of logs in its boom on Friday, October 1st, 1897, which had been furnished to it by the Atlantic Lumber Company, and upon the purchase price
51 of which about $8,000.00 was then due, and about five million feet of lumber, and that the writs of attachment were on that day levied on said logs and lumber; that the saw-mill plant was a fixture and that the sheriff never took possession of it, and only levied the writ of attachment so as to create a lien upon it; that the sheriff held possession of the logs until October 11th, 1897, when he permitted the plaintiff to take possession of them, and to saw them up, with the understanding that the lumber manufactured therefrom should take the place of the logs; that the mill was closed down from October 1st, to October 11th, or seven working days, and that the plaintiff started up its mill on October 11th, 1897, and ran it at its full capacity until November 7th, 1897, during which time it sawed up the logs levied on; and that on November 12th, 1897, plaintiff resumed sawing and continued until November 16th, 1897, during which time it sawed up about 400,000 feet of logs, which it purchased after October 1st, 1897, and that the mill was then closed down for want of logs to saw; that prior to October 1st, 1897, the plaintiff had been supplied with logs by the Atlantic Lumber Company at the rate of 2,000,000 feet per month, but after that time said Atlantic Lumber Company refused to deliver any more logs to the plaintiff, and that the plaintiff failed to procure from any other source the logs with which to carry on its business.

That on October 1st, 1897, the plaintiff had on hand various orders for lumber which had not been sawn out, and which it was unable to completely fill; and that 1,250,000 feet of the lumber on October 9th, 1897, was delivered to the plaintiff, it giving a forthcoming bond therefor, and at the same time the sheriff upon being indemnified by the plaintiff, permitted the plaintiff to load the bal-

ance of the lumber on vessels and ship it North as fast as the vessels arrived, and on November 4th, 1897, the plaintiff gave the sheriff a forthcoming bond in the penalty of $100,000 and that thereupon the sheriff delivered to it all of the lumber, logs and other personal property; that prior to December 28th, 1897, all of the lumber on hand October 1st, 1897, and that manufactured afterwards from the logs levied on, and that manufactured from about 400,000 feet of logs subsequently purchased, was delivered by the plaintiff to the parties in New York and Boston with whom it had contracts on October 1st, 1897, except a portion of old or second-class board which was, on December 28th, seized under the attachments of other creditors of the plaintiff, and there was no testimony to show or tending to show, that the plaintiff got any less for said lumber than it would have received had no attachment been levied, or to show
52 that the lumber deteriorated while in the sheriff's possession or was injured in any way, and it was established by the evidence that the price of lumber improved after October 1st, 1897; that there *was* shipped from the mill in October 1897, 1,510,750 feet of lumber; 2,658,284 feet in November and 950,324 feet in December; that plaintiff was unable to completely fill the contracts which it had on hand October 1st, 1897, owing to the fact that it had not sufficient logs on hand from which to cut the orders and was unable to buy any others; and Charles L. Bucki, president of the company, testified that the mill had made the following profits: In March, 1897, $8,722.40, in April, $8,154.48, in May $7,966.00, in June $3,269.80, in July $5,067.48, in August $1,932.00, and in September $422.00. And the said Charles L. Bucki testified that the small profits realized in September and August, was due to the small quantities of lumber manufactured in those months, to wit, 1,984,169 in August and 1,478,633 in September. And there was testimony tending to establish that on October 1st, 1897, the plaintiff was negotiating with the Sheppard-Morse Lumber Company of Boston for a loan of $25,000.00 from said Sheppard-Morse Lumber Company, to be secured by a mortgage on plaintiff's mill plant, and certain piles of lumber which the said Sheppard-Morse Lumber Company were to obligate themselves to buy from the plaintiff at the rate of a million feet a year for the period of three years, at the price then prevailing, and the said Charles L. Bucki testified that on October 1st, 1897, during the forenoon, an officer of said Sheppard-Morse Lumber Company telephoned him that his company would execute the contract and send it and the money that afternoon.

It was established by the testimony that the Degnen-McLean Lumber Company had made a claim for damages against the plaintiff on account of loss, sustained by said Degnen-McLean Lumber Company, through the non-delivery of lumber to it by the plaintiff, subsequent to October 1st, 1897.

And Charles L. Bucki, president of the company, testified that about October 6th, he came from New York to Jacksonville to give his attention to the attachment suits and brought with him J. D. Bucky, a stockholder of the company, to assist him, and that thereafter he devoted a great deal of his time to the lawsuits, but there

was no testimony to show that the plaintiff had incurred any other expense in and about the defense of the attachment proceedings beyond the testimony in regard to the amount incurred for attorneys' fees and the sum of $415.00 costs, for which the plaintiff recovered judgment against the Atlantic Lumber Company in the said
53 attachment proceeding, which judgment the evidence showed had been paid.

And H. W. Simmons, a witness for defendant, testified that he was the financial manager of the plaintiff during the summer of 1897, and that the credit of the plaintiff was bad in August and very bad in September, and that the plaintiff could not in September, 1897, get any loans from New York banks, and that on October 1st, 1897, it was necessary for the plaintiff to have a loan of $25,000 in order to continue in business at all, and a loan of $50,000 in order to continue its business successfully, and that Charles L. Bucki, president of said plaintiff, testified that said H. W. Simmons was not authorized to represent the plaintiff in obtaining any loan.

And Bion H. Barnett testified that he was the cashier of the National Bank of Jacksonville, Florida, and that the plaintiff did its Jacksonville banking business with his bank, prior to October 1st, 1897, and that the credit of the plaintiff at his bank in September, 1897, was limited.

One John N. C. Stockton, a witness called by the defendant, testified that on February 22nd, 1898, he leased the mill of the plaintiff for twelve months at a rental of one thousand dollars per month; that during the period of his lease he manufactured only between six and seven million feet of lumber and that the reason he did not manufacture more was that he did not wish to risk more money and that he did not believe that the mill, if it had been operated at its full capacity that year, would have made any money, and evidence established that during the time the said Stockton operated said mill, it was operated at a loss of $18,000.00. That said Stockton had no practical experience as a manufacturer of lumber.

And it was established by the evidence that of February 5th, 1899, the entire mill plant, including the lands, wharves, boom and appurtenances were sold under execution to satisfy a judgment of one Schwaab for $2,200.00, on obligations incurred after the writ of attachment was levied, and was purchased by Henry Weiler, a director in the company, for $2,300.00 who purchased the same in the interest of Charles L. Bucki.

Fifteenth exception. And thereupon all the evidence pertinent to said charge being contained in the foregoing statement of evidence, which is hereby made a part of this exception, the court, at the plaintiff's request, charged the jury as follows, to wit:

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties, caused by these attachments. The
54 defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties, in consequence of the attachment, because the defendant asserts, the plaintiff was in such financial condition that it could not have con-

tinued in business even if the attachments had not been issued and levied. This is a question of fact for you to determine upon all of the evidence in the case, and if you believe from all of the evidence in the case that if these attachments had not been issued and levied upon the plaintiff's properties, it, the plaintiff, would have been able to have continued in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained as a direct and proximate consequence of these attachments."

And the defendant did then and there, before the jury retired, except to the giving of the foregoing charge on the following grounds:

1st. Because damages to business were too remote and speculative, and

2nd. Because there was no evidence from which damages to business could be estimated with certainty, and the instruction permitted the jury to speculate as to such damages, and because the same conflicts with the charge given by the court of its own motion.

Seventeenth exception. And the court, at the request of the plaintiff, gave the jury the following instruction, the testimony pertinent thereto being contained in the foregoing statement of the evidence which is hereby made a part of this exception. And it further appearing that the Degnen-McLean Lumber Company, one of the parties to whom the plaintiff had contracted to sell lumber, had made a claim against plaintiff about the latter part of November, 1897, on account of lumber it had had to purchase at retail to supply some ordered from plaintiff and which plaintiff had failed to deliver, but there being no evidence to show that plaintiff was liable therefor, further than the testimony of Charles L. Bucki, that the said company had rendered the plaintiff a bill therefor.

"Another element of damage claimed by the plaintiff, is that the attachment interrupted the business and by such interruptions and the consequences thereof, resulting from the attachments, the plaintiff was prevented from sawing and shipping lumber to ascertain parties in Baltimore, New York and Boston, which plaintiff agreed to furnish prior to October 1st, 1897; that such losses consist
55 of certain amounts the purchasers of the lumber had to pay to supply what they had purchased from the plaintiff. The court instructs you that the defendant is liable for all such losses, if any resulted as a direct consequence of the attachments."

And the defendant did then and there, before the jury retired, except to the said charge as a whole on the ground that such damages were too remote and particularly to the last two paragraphs of said charge on the ground that such damages were too remote and because they were not claimed in the declaration.

Seventeenth exception. And the court, at the request of the plaintiff, gave the following instruction to the jury, all the evidence pertinent thereto being contained in the foregoing statement of the evidence which is hereby made a part of this exception by reference, to wit:

"The jury are the exclusive judges as to the effect of the writs of attachment upon the business of the plaintiff, that is to say: when you consider any item of damages in this case, you are the sole judges as to whether the writs of attachment and the levy of the same, directly and proximately caused the damage of injury, or whether there was some other intervening cause for the damage or injury, independent of the attachment that would have caused the damage if the attachment had not been issued;" and the defendant, then and there before the jury retired, excepted to the said charge on the ground that it permitted the jury to allow damages for injury to business which are too remote and because the said instruction imposed no other restraint upon the jury in the assessment of damages than such as their caprice might suggest, and because said charge conflicted with that given by the court of its own motion.

Eighteenth exception. In charging the jury, the court, at the plaintiff's request, charged the jury as follows:

All the evidence pertinent to said charge being contained in the foregoing statement of the evidence which is hereby made a part of this exception by reference, to wit:

"It is the province and right of the jury to decide from the evidence whether or not these writs of attachment defeated and prevented the carrying out and performance of any contract with Sheppard, Morse & Company, for the loan of money or for the delivery of lumber, and damages sustained by the plaintiff by such non-delivery, and it is your right and duty to decide upon the
56 evidence whether or not these writs of attachment prevented the plaintiff from delivering any lumber to the Degnen-McLean Company, or E. B. Hunting & Company, which plaintiff prior to October 1st, 1897, had contracted to deliver and if you find such prevention of deliveries to award such damages as the evidence justified," and the defendant did then and there, before the jury retired except to the giving of the said charge on the ground that such damages were too remote and that said charge was in conflict with the general charge of the court and because there was no evidence before the court which justified the submission of said question to the jury.

Nineteenth exception. And the court, at the instance of the plaintiff, gave the following instruction to the jury, the evidence pertinent thereto being contained in the foregoing statement of the evidence which is hereby made a part of this exception by reference, to wit:

"You are the exclusive judges as to the facts of this case; you are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequence of the issuing and levying of these writs of attachment; these damages consist of two general consequences:

1st. All moneys paid out and all expenses incurred in and about and attending to the preparation of the trial of the motions to dissolve the attachments and on the trial of such motions which

became reasonably necessary as a direct consequence of the attachment;

2nd. All consequential damages, that is, all damages caused by the interruption of the plaintiff's business either by disabling the plaintiff from operating its mill or disabling it to deliver timber and lumber it had agreed to deliver prior to October 1st, 1897, if you believe from the evidence that the direct and proximate effect of such attachments caused such interruption of the plaintiff's business."

And the defendant did then and there, before the jury retired, except to the second paragraph of said charge, on the ground that the damages to business and loss of profits on contracts were too remote and speculative and because there was no evidence that justified the submission of such charge to the jury, and because said charge was in conflict with the charge given by the court of its own motion.

Third. And the said judge, in his general charge, did of his own motion instruct the jury as follows:

Now the determination of this question by you becomes very much more difficult on account of other attendant circumstances,
57 circumstances attending the levy of the writ of attachment.

At the same time that the writs of attachment were levied, there were two common-law suits commenced, both of which have been terminated. The next attendant circumstance is that the Atlantic Lumber Company cancelled its contract, or attempted to cancel it, that is, the contract came to an end by the Atlantic Lumber Company refusing and ceasing to furnish any more logs to the Bucki Company. Therefore, I say, the three combining circumstances, the levy of the writ of attachment, the ceasing to furnish logs under that contract and the bringing of the common-law suits, unite in being causes for a subsequent suffering of damage by the Bucki Company. The law is this, that where a party sets in force a wrong, an intervening cause will not prevent the effect of that wrong; a party instituting or setting forth a wrong may be held liable for all damages that occur from it, that can be traced directly to it, but in this case, the writs of attachment did not cause the suspension of the furnishing of the logs, nor did the suing out of the writs of attachment cause the beginning of the common-law suits. It makes it more difficult for you to determine, and, therefore one of the important questions for you to determine is, just what damages resulted alone from the writs of attachment, not how much the Bucki Company was damaged at all, from the combination of circumstances, but how much you should charge directly to the issuing of the writs of attachment.

Taking into consideration the several causes tending to interfere with the business of the Bucki Company, tending to injure their credit and break up their business, I was fully satisfied from the evidence that there can be no certain, positive, direct amount arrived at which could be charged to the levying of the writs of attachment as separated and distinct from the other interfering causes in the case. I therefore, as you have seen, during the trial of the case,

granted a motion to strike all testimony relating to what the Bucki Company might have made in the future from conducting its business considering the uncertainty of procuring a loan, of procuring timber lands, of procuring a logging plant, of procuring logs, or running its mill and of selling lumber at a profit; the uncertainty of all those questions was so great, that there was no foundation under the law of determining certainly and directly and definitely any amount of damages which could be taxed against a party in this case. Therefore, I instruct you, gentlemen, the damage must be confined to the direct effect of the levy upon the mill and the lumber for the time being, and these damages you will determine from the testimony.

58 Remembering that your duty is to find just how much the party has been damaged and suffered directly, I consider as a matter of law, that the question of damage to credit and the profits that the plaintiff might have made had it continued business is too uncertain and too remote. What you can consider as clear, distinct and certainly proven damages you will find."

Nineteenth and one-half exception. The order made by the court excluding testimony in regard to profits which is referred to in the foregoing charge, being in the words and figures following, to wit: This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced any damages arising from consideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing of lumber and the supply of timber lands, all testimony as to the daniage to credit and loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered only for the purposes of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachments, and the motion be denied in all other respects. To which ruling and order of the court the defendant, by its attorney, did then and there except and this constitutes the defendant's exception No. 19½.

Twentieth exception. And the plaintiff having been permitted to prove over defendant's objection that on October 1st, 1897, it had on hand certain contracts for the sale and delivery of lumber to the Yellow Pine Lumber Company, the Degnen-McLean Company, and E. B. Hunting & Company, and it being established beyond dispute that each of these parties were willing to accept the lumber under their contracts long after the 16th day of November, 1897, on which day the plaintiff's mill was closed down for want of logs to saw, and there being evidence tending to show that the failure to fill these orders was due entirely to the inability of the plaintiff to buy the logs from which to cut the lumber for said orders, the defendant, after the taking of testimony had been closed, and before the jury retired, requested the court in writing to instruct the jury as follows:

"The court instructs the jury that they shall allow the plain-
59 tiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1st, 1897, if such inability was due to the fact that the plaintiff was unable to buy the logs from which to cut said lumber," but the court refused to give the jury the said charge, and to the said refusal the defendant did then and there, before the jury retired, except.

It was established by the testimony that the writs of attachment were levied on the lumber at the mill and about three million feet of logs in the boom on October 1st, 1897, and that the mill was shut down from October 1st, 1897, to October 11th, 1897, or seven working days, and there was testimony tending to show that such shutdown was due to the fact that the sheriff hei possession of the said logs under the writs of attachment; it was further established by the evidence that the mill was started up on October 11th, 1897, under an indemnity bond, as herein stated, and ran at its full capacity until the logs in the boom were sawed up, and that the mill finally closed down on November 15th, 1897, and was not thereafter operated by the plaintiff because of the lack of logs to saw; that the sawmill was a fixture and that the sheriff levied the writ for $75,000 upon it, but did not take possession thereof.

And the said Charles L. Bucki testified that on October 1st, 1897, the plaintiff had in its employ the following salaried officers, at the following annual salaries: A mill superintendent at a salary of $2,500.00; a president at a salary of $5,000.00; a planing-mill superintendent at a salary of $1,500.00; an auditor at a salary of $1,200.00 per year; a secretary and treasurer at a salary of $3,000.00; two stenographers, one at a salary of $1,000.00 and another at a salary of $750.00; a book-keeper at a salary of $1,200.00, and two salesmen at salaries of $600.00 each, and that their year began April 1st, 1897; that the secretary, one stenographer, a book-keeper and the two salesmen were employed in the New York office and the others were employed in Jacksonville; there was testimony tending to establish that the New York employés were idle in October, 1897, during the time the mill was shut down, but there was no testimony to show whether the Jacksonville employés were employed or not, except that the auditor testified that he was at work the whole of the month of October, 1897; it was established by the evidence that the mill wharves were crowded with the lumber during the months of August and September, 1897, and that as a result of this, the mill lost ten working days in August and thirteen in September, and that on October 1st, 1897, the wharves were as full of lumber as they could be got.

The testimony further established that on October 1st, 1897,
60 the plaintiff's indebtedness was about $64,000.00, which included $5,900.00 due its day laborers at the mill, and that on that day it had in cash $112.50. That all said laborers were paid on Oct. 11th.

21st exception. And thereupon the court, of its own motion, gave the following charge to the jury, the evidence pertinent thereto being included in the foregoing statement:

"Another point is the damages claimed for salaries of the officers and employés of the Bucki Company for the time of their enforced idleness; that is, the time they continued on salaries, and on account of the granting of the writs of attachment were suspended from active operations. You have heard the testimony upon that, and you will determine just how far the Bucki Company suffered in damages on account of the time that their employés were compelled to remain idle and earned nothing, although they were on wages."

To which charge the defendant did then and there, and before the jury retired, except.

22nd exception. And thereupon the defendant, before the jury retired, requested the court in writing to instruct the jury as follows:

"The jury are instructed that the inquiry in regard to the loss of time by the employés shall be limited to the period between October 1st, 1897, and October 11th, 1897, and that no damages can be allowed for any time lost by plaintiff's employés after October 11th, 1897;" but the said court refused to give such charge, to which action the defendant, before the jury retired, did except.

23rd exception. And thereupon, the defendant, after the taking of the testimony had been completed, and before the jury retired, requested the court in writing to give the following charge to the jury:

"The court instructs the jury that they cannot find any damages for the plaintiff on account of the loss of time of its employés unless they find from the evidence that the time of some of the employés was actually lost on account of the levy of the writs of attachment. And if the *the* jury should find from the evidence that any time found to have been lost by the employés would have been lost even though no attachment had been levied, then they shall find no damages for the plaintiff, on account of such lost time," but the court refused to give the said instruction, considering that the substance thereof
61 had been included in the preceding charge given by the court; to which action the defendant did then and there, before the jury retired, except.

24th exception. And the defendant, after the taking of testimony had been completed, and before the jury retired, did request the court in writing to give the following charge to the jury:

"If the jury finds from the evidence that the period of seven working days would have been lost in October, and that the mill ran seven days longer in November than it would have done had the shut-down in October not occurred, then you shall find no damages for the plaintiff, on account of such shut-down," but the court refused to give the said instruction; to which refusal the defendant did then and there, before the jury retired, except.

25th exception. And thereupon, after the taking of testimony had been completed, and before the jury retired, the defendant requested the court in writing to give the following charge to the jury:

"If the jury finds from the evidence that the plaintiff manufactured as much lumber after October 1st, 1897, as it would have done had no shut-down occurred in October, then they shall find

no damage for the plaintiff, on account of such shut-down," but the court refused to give the said instruction, to which action the defendant did, then and there, before the jury retired, except.

The foregoing requests by the defendant for the instructions specified in exceptions numbered 22, 23, 24, 25, and 25½ were predicated upon the evidence stated in the foregoing statement of evidence and upon the following evidence:

It was established by the evidence that the sheriff levied the writs of attachment on all the saw-logs of the plaintiff and that the mill did not run between October 1st and 11th, 1897, or seven working days, and that the wharves of the plaintiff were full of lumber on October 1st, 1897, and that the plaintiff on that day owed its employés $5,900.00, and that the same was not paid to them until October 11th, and it being established by the evidence that the highest monthly average of the output of the mill was between 2,000,000 and 2,500,000, and that the plaintiff sawed 2,514,343 feet of lumber between October 11th and November 1st, 1897, and it further appearing that the plaintiff shut down its mill finally on November 16th, 1897, because of its inability to obtain logs to saw, and there being evidence tending to establish that the plaintiff could not for some time have obtained the logs necessary
62 to run its mill to its full capacity, even though no attachment had been issued against its property.

And there was testimony tending to establish that the employés in the New York office were not employed during the time the mill was shut down in October, 1897, but none to show whether the Florida employés were idle or not, beyond the fact that the mill was shut down, and the testimony of the auditor that he was engaged the whole time. And it was established by the evidence that the plaintiff was never at any time deprived of the possession of its mill or denied full authority and control over it.

And it was established by the evidence that the writs of attachment for $75,000.00 and $8,980.00 were on October 1st, 1897, levied upon all the logs and lumber at the plaintiff's mill, and that the same were taken possession of by the sheriff under said writs: that on the 9th day of October, 1897, the plaintiff gave the sheriff two certain indemnity bonds, in order to secure the right to saw up the saw-logs and ship its lumber, which are in the words and figures following:

Know all men by these presents, that we, the L. Bucki & Son Lumber Company, Charles L. Bucki, Frederica Bucki, J. M. Des Roches, Roderick G. Ross, Colvin H. Robertson and Philip Walter are held and firmly bound unto Napoleon B. Broward in the sum of twenty thousand dollars, for the payment whereof, well and truly to be made, we jointly and severally bind ourselves and our heirs and representatives respectively.

Signed and seal- this 9th day of October, A. D. 1897.

The condition of the foregoing obligation is such that, whereas, said Broward is sheriff of said county of Duval and State of Florida, and as such sheriff has received certain writs of attachment in the several suits now pending against the L. Bucki & Son Lumber Com-

pany, and as such sheriff has taken possession of certain lumber as the property of said company and is about to relinquish such possession and turn over to certain vessel or vessels in the St. Johns river certain portions of said lumber.

Now, therefore, if the said lumber, or any part thereof, is turned over to said vessel or vessels, and the said Broward is fully paid and indemnified for any and all loss he may suffer because of his relinquishing possession as aforesaid, then this obligation is to be void; else to remain in full force and virtue.

THE L. BUCKI & SON LUMBER CO.,
By CHARLES LLOYD BUCKI, *Pres.* [SEAL.]
CHAS. L. BUCKI.
FREDERICA BUCKI,
63 By CHAS. L. BUCKI, *Att'y-in-fact.* [SEAL.]
J. M. DESROCHES. [SEAL.]
RODERICK G. ROSS. [SEAL.]
COLVIN H. ROBERTSON. [SEAL.]
PHILIP WALTER. [SEAL.]

(Indorsed:) Plaintiff's Ex. 23 read in evidence Jan'y 30, 1900, in L. Bucki & Son L. Co. *vs.* Fidelity & Deposit Co., &c. E. O. Locke, clerk, by Louis Starke, deputy. Indemnity bond.

Know all men by these presents, that we, the L. Bucki & Son Lumber Company, Charles L. Bucki, Frederica Bucki, J. M. Des Roches, Roderick G. Ross, Colvin H. Robertson and Philip Walter are held and firmly bound unto Napoleon B. Broward in the sum of thirty-six hundred dollars, for the payment whereof, well and truly to be made, we jointly and severally bind ourselves and our heirs and representatives respectively.

Signed and seal- this 9th day of October, A. D. 1897.

The condition of the foregoing obligation is such that, that whereas, said Broward is sheriff of said county of Duval and State of Florida, and as such sheriff has received certain writs of attachment in the several suits now pending against the L. Bucki & Son Lumber Company, and as such sheriff has taken possession of certain lumber as the property of said company and is about to relinquish such possession and turn over to certain vessel or vessels in the St. John's river certain portions of said lumber.

Now, therefore, if the said lumber, or any part thereof, is turned over to said vessel or vessels, and the said Broward is fully paid and indemnified for any and all loss he may suffer because of his relinquishing possession as aforesaid, then this obligation is to be void: else to remain in full force and virtue.

THE L. BUCKI & SON LUMBER CO.,
By CHAS. LLOYD BUCKI, *Pres.*
CHAS. L. BUCKI. [SEAL.]
FREDERICA BUCKI, [SEAL.]
By CHAS. L. BUCKI, *Att'y-in-fact.*
J. M. DESROCHES. [SEAL.]
RODERICK G. ROSS. [L. S.]
COLVIN H. ROBERTSON. [SEAL.]
PHILIP WALTER. [SEAL.]

64 (Indorsed:) Indemnity bond. Plaintiff's Exhibit No. 18 read in evidence Jan'y 30, 1900, in L. Bucki & Son L. Co. *vs.* Fidelity & Deposit Co., &c. E. O. Locke, clerk, by Louis Starke, deputy.

That on October 11th, 1897, the plaintiff gave the sheriff a forthcoming bond in the amount of $20,000, which forthcoming bond is in the words and figures following:

In the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Fla.

THE ATLANTIC LUMBER COMPANY, Plaintiff,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant.

Forthcoming Bond.

Know all men by these presents, that we, L. Bucki & Son Lumber Company, a corporation organized under the laws of New Jersey, as principal, and Charles L. Bucki, Frederica Bucki, John M. Des Roches, Colvin H. Robertson, Philip Walter and Roderick G. Ross as sureties, are held and firmly bound unto the Atlantic Lumber Company, a corporation organized under the laws of Florida, in the sum of twenty thousand ($20,000) dollars, for the payment whereof well and truly to be made, the said L. Bucki & Son Lumber Company binds itself and its successors, and the said sureties bind themselves, and each of them, and their and each of their executors and administrators.

Signed and sealed this 9th day of October, 1897.

The condition of the foregoing obligations is such that, whereas, the said The Atlantic Lumber Company, on the — day of October, 1897, sued out a certain writ of attachment in a certain suit pending in said court, wherein the said The Atlantic Lumber Company was plaintiff, and the said L. Bucki & Son Lumber Company was defendant, which said writ was levied upon certain property of the said defendant, to wit: one million two hundred and fifty thousand feet of yellow-pine merchantable lumber as the property of defendant.

Now, if the said L. Bucki & Son Lumber Company shall have forthcoming the said property so levied upon, and shall abide the final order of the court, then this obligation shall be null and void; otherwise to remain in full force and virtue.

[Bucki Co. Corporate Seal.]

L. BUCKI & SON LUMBER CO.
CHAS. LLOYD BUCKI, *Pres't.*
C. W. SIMMONS, *Sec'y.*
CHAS. L. BUCKI. [L. S.]

65 FREDERICA BUCKI,
By CHAS. L. BUCKI, [L. S.]
Att'y-in-Fact.
JOHN M. DESROCHES. [L. S.]
COLVIN H. ROBERTSON. [L. S.]
PHILIP WALTER. [L. S.]
RODERICK G. ROSS. [L. S.]

Taken and approved Oct. 11th, 1897.
N. B. BROWARD, *Sheriff.* [SEAL.]

(Indorsed :) In the circuit court, State of Florida, county of Duval. The Atlantic Lumber Company *vs.* The L. Bucki & Son Lumber Co. Forthcoming bond for $20,000, under writ of October 1, '97. Received and approved on the 11th day of Oct., 1897. N. B. Broward sheriff. Plaintiff's Exhibit 11 read in evidence in L. Bucki & Son L. Co. *vs.* Fidelity & Deposit Co., this 22nd day of Jan'y, 1900. E. O. Locke, clerk, by Louis Starke, D. C.

And thereby secured the surrender and possession of 1,250,000 feet of lumber, and that on November 4th, 1897, the plaintiff gave the sheriff a forthcoming bond in the penalty of $100,000.00, which is in the words and figures following:

In the Circuit Court of the United States, Southern District of Florida.

THE ATLANTIC LUMBER COMPANY, Plaintiff,
vs.
L. BUCKI & SON LUMBER COMPANY, Defendant.

Know all men by these presents, that we, L. Bucki & Son Lumber Company, a corporation organized and existing under the laws of New Jersey, as principal, and Charles L. Bucki and Frederica Bucki and the Fidelity and Deposit Company of Maryland, a corporation organized and existing under the laws of Maryland, and which has obtained a certificate under the laws of Florida authorizing it to do business as a surety company, under and by virtue of the laws of Florida, as sureties, are held and firmly bound unto the Atlantic Lumber Company, a corporation organized and existing under the laws of Florida, in the sum of one hundred thousand dollars, for the payment whereof well and truly to be made, the said L. Bucki & Son Lumber Company binds itself, and its successors and assigns, and the said The Fidelity and Deposit Company of Maryland binds itself, and its successors and assigns, and the said Charles L. Bucki, and the said Frederica Bucki bind themselves, their and each of their heirs, executors and administrators, jointly and severally, firmly by these presents.

66 Signed and sealed this the 4th day of November, A. D. 1897.

Now, the condition of this obligation is such that, whereas, the sheriff of Duval county, Florida, by virtue of a certain writ of attachment, issued out of the circuit court of Florida in and for Duval county, in a certain cause then therein pending, wherein the said The Atlantic Lumber Company was plaintiff, and the said L. Bucki & Son Lumber Company was defendant, has levied upon the following property, to wit: 4,983,920 feet of sawn lumber and timber, and 3,000,000 feet of round timber, not sawn, all of the value of fifty thousand dollars, fixed by the sheriff of Duval county, Florida, and the said L. Bucki & Son Lumber Company wishes to regain pos-

session of the same. Now, if the said L. Bucki & Son Lumber Company shall have the said property forthcoming, and shall abide the final order of the circuit court of the United States for the southern district of Florida, to which the said action has been removed, and wherein said action is now pending, then this obligation shall be null and void; otherwise to remain in full force and virtue.

[Bucki Co. Seal.]

THE L. BUCKI & SON LUMBER CO.,
By CHAS. LLOYD BUCKI, *President.*
CHAS. LLOYD BUCKI. [L. S.]
FREDERICA BUCKI,
By CHAS. LLOYD BUCKI, [L. S.]
Att'y-in-Fact.

[Fidelity Co. Seal.]

FIDELITY & DEPOSIT COMPANY OF MARYLAND,
Per E. M. M. WARFIELD, *President.*
Attest: H. E. BOSLER, *Secretary.*

Taken and approved November 4th, 1897.
N. B. BROWARD, *Sheriff.* [SEAL.]

STATE OF MARYLAND, *City of Baltimore,* } *ss:*

On this 30th day of Oct., A. D. 1897, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Edwin Warfield, president, and H. E. Bosler, secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself, deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

67 In testimony whereof, I have hereunto set my hand and affixed my official seal, at the city of Baltimore, the day and year first above written.

FRED S. AXTELL,
Notary Public.

(Indorsed:) Bond. Atlantic Lumber Co. *vs.* L. Bucki & Son Lumber Co. Forthcoming bond for $100,000 under writ No. 2 of Oct. 1, 1897. Received and approved Nov. 4th, 1897. N. B. Broward, sheriff. Plaintiff's Ex. 10 read in evidence in L. Bucki & Son L. Co. *vs.* Fidelity & Deposit Co. by plaintiff this 22nd day of Jan'y, 1900. E. O. Locke, clerk, by Louis Starke, D. C.

And that thereupon the sheriff surrendered to the plaintiff the possession of all the logs, lumber and personal property levied upon by said sheriff, by virtue of said writs; that on November 1st, 1897, the attachment of $9,980.80, mentioned in the first count of the declaration was dissolved, from which order of dissolution no writ of error was taken; that on February 14th, 1897, the court dissolved the writ of attachment for $75,000.00 and ordered the sheriff to immediately return all property levied on to the plaintiff; that on April 25th, 1898, the Atlantic Lumber Company sued out a writ of error directly from the said order of February 14th, 1898, dissolving the writ of attachment and obtained an order directing that said writ of error should operate as a supersedeas, which writ of error was afterwards held by the circuit court of appeals to be unauthorized by law; that final judgment was entered in the common-law action, to which said judgment for $75,000.00 was ancillary on May 7th, 1898; that on July 8th, 1898, the Atlantic Lumber Company sued out a writ of error from said judgment and obtained an order from said court directing that said writ of error should operate as a supersedeas of the said order of February 14, 1898, dissolving said attachment upon the filing of a bond in the penalty of $1,500, with approved security, conditioned to pay all damages and costs, which bond was given; that the circuit court of appeals for the fifth circuit affirmed the said judgment on January —, 1899; that on May 22nd, 1899, the Atlantic Lumber Company applied to the Supreme Court of the United States for a writ of certiorari, which was denied on May 29th, 1899; that the writ of $9,980.80 was ancillary to a common-law action wherein damages to the amount of $15,000 was claimed, and the writ of $75,000.00 was ancillary to a common-law action, wherein $200,000 damages were claimed and that these two suits were consolidated by order of the court, and that on May 7th, 1898, the Atlantic Lumber Company recovered judgment
68 therein for $8,600.00, which remains due and undischarged, and which became a lien on the mill property; that there was no evidence showing or tending to show that the plaintiff had sold said lumber for any less than they could have sold it for had no attachment been levied, and there was no evidence that plaintiff was limited or embarrassed in the use of the money received for the lumber by reason of the attachment, except the effect of its having given a forthcoming bond, and it was established by the evidence that the plaintiff, prior to November 16th, 1897, had sawed up all the logs which it had in the boom at that time, and that prior to December 28th, 1897, it had sold and shipped to parties in New York and Boston all the lumber sawed from these logs and all on hand October 1st, 1897, except a portion of old lumber and second-class boards, which was, on December 28th, 1897, seized under the attachment of other creditors. It was established by the evidence that the plaintiff sold and shipped from the mill the following quantities of lumber prior to December 28th, 1897; In October, 1,510,750 feet; in November, 2,659,284, and in December, 950,324 feet; and there was no evidence tending to show that plaintiff sold said lumber for any less than it would have sold it had no attachment been

levied on it, or that plaintiff was embarrassed in the use of the proceeds thereof any more than the legal effects of the forthcoming bond, or retained the said proceeds to meet the said obligation imposed by the said forthcoming and indemnity bonds; and there was evidence tending to show that for the lumber shipped in October, plaintiff received $14,055.74; for that shipped in November, $22,846.57, and for that shipped in December, $2,483.63.

26th exception. And the court, of its own motion, gave the jury the following instruction, the evidence pertinent thereto being contained in the foregoing statement.

The evidences in this case shows that after ten days there was a forthcoming bond given to the sheriff, and the plaintiff in this case assumed all the risk and responsibility of taking possession of that property. The first bond permitting them to go to work was given on the 11th of October, and there was a million and a half feet of lumber released from this attachment on the 4th of November; there was a forthcoming bond, releasing all the rest of the mill and the property.

"Now, as I say, the plaintiff contends, that as this case continued, this question of attachment continued; that it was suffering under the attachment, the lien of the attachment until the sixth day of June, 1899, when finally the action of the Supreme Court of the United States became conclusive, and these attachments were finally determined beyond further question. That is the contention
69 of the plaintiff; they claim damages by the interference of these writs of attachment for this entire time from the first of October, 1897, up to the 6th of June, 1899."

"The defendant contends that plaintiff having taken possession of the property, used it, sawed it up, used their mill, leased their mill, and used their lumber, sawed their lumber, filled their contracts as far as they saw fit, and that the contention of the plaintiff is not sound or is not just under the law. I instruct you in regard to that point, that although the plaintiff in this case took possession of that property, there was hanging upon that possession the risk, which it assumed, that it might be compelled to return the property, because it could be compelled to do so. It had the right when it took possession, but in doing so it became liable for any amount which might be pronounced in those attachment suits, and the sheriff could look to it. The important question is this: How much damage did the plaintiff suffer by having that attachment bond and the levy of that attachment hanging over it, although it was using and disposing of its property. That is the most difficult question for you to determine. If you can determine from the testimony of the value of the property as has been stated, and all the facts and circumstances that are in the testimony, it will be for you to say and determine such damages."

"Notwithstanding the possession and use of the property, the plaintiff has asked that interest upon the value of the lumber be allowed them, the value of the lumber for the entire time be allowed them, as if they had not taken possession of it, had not used it. I instruct that the plaintiff was not bound to give a forthcoming bond and take possession of the property, but it did it voluntarily, and the question

is, what has been the damage with the hanging lien and the risk it assumed for that time."

And the defendant then and there, before the jury retired, did except to the said charge on the grounds that there was no evidence that justified the submission of such a charge to the jury, and that any damages resulting to the plaintiff from the continued existence of the lien of the attachment on the personal property after it had been relsased on forthcoming bond, was too remote, speculative and shadowy to be capable of estimation.

27th exception. And whereupon, the court, at the request of the plaintiff, gave the following instructions to the jury, the evidence pertinent thereto being contained in the foregoing statement:

"Property, the possession of which is held by virtue of a bond given in the course of a judicial proceeding, and process issued thereon, is held upon the process of the law. No change in title is effected. If the person so holding parts with its possession he
70 does it at his peril," to which charge the defendant did then and there, before the jury retired, except on the same grounds as last above.

28th exception. And thereupon, the court, at the request of the plaintiff, gave the jury the following charge, the evidence pertinent thereto being contained in the foregoing statement:

"It was not the duty of the plaintiff to give forthcoming bonds or indemnity bonds to the sheriff or the plaintiff in the attachment suit."

To the giving of which charge the defendant did then and there, before the jury retired, except, on the same grounds as last above, and because the charge was illegal.

28½ exception. And thereupon, the court, at the request of the plaintiff, gave the jury the following charge, the evidence pertinent thereto being contained in the foregoing statement:

"The giving of the forthcoming bonds did not discharge the lien of the attachment upon the property attached, and the plaintiff, after obtaining possession of the logs and lumber and timber levied on, could not sell and dispose of the same and give a good title to the purchaser, free and clear of the attachment liens without assuming any risk of the property being demanded or damages being entailed."

To which charge the defendant did, then and there, before the jury retired, except, on the same grounds as last above, and because the principle of law embodied in said charge was erroneously stated.

29th exception. And thereupon, the court, at the request of the plaintiff, gave the following instruction to the jury, the evidence pertinent thereto being contained in the foregoing statement:

"After giving the forthcoming bonds, for the personal property, to wit: logs and lumber levied upon, the plaintiff held such property as bailee for the sheriff, and was bound to deliver such property back into the sheriff's possession whenever such sheriff demanded the possession of such property for the purpose of enabling the sheriff to sell the same to satisfy any judgment the court might render in the attachment suit."

To the giving of which charge the defendant did, then and there, before the jury retired, except.

30th exception. And thereupon, the court, at the request
71 of the plaintiff, instructed the jury as follows, the evidence pertinent thereto being contained in the foregoing statement:

"If the plaintiff sold such property after giving such forthcoming bonds, in contemplation of law, the plaintiff held the proceeds of such sales in its hands, and had the legal right to hold such proceeds in its hands to pay any judgment that might thereafter be recovered against it in the suits in which the attachments were issued until such lien of the attachments ceased to exist."

To the giving of such charge the defendant did, then and there, before the jury retired, except.

31st exception. And thereupon, the court, at the request of the plaintiff, gave the jury the following charge, the evidence pertinent thereto being contained in the foregoing statement:

"The court instructs you to award damages to the plaintiff, which it sustained by reason of or in consequence of the levy of the attachments upon all of the timber and lumber and logs, and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber lumber and logs, considering any deduction from such damages from the fact that the forthcoming bonds or indemnity bonds were given by the plaintiff."

And the defendant did, then and there before the jury retired, except.

32nd exception. And thereupon, the court, at the request of the plaintiff, gave the jury the following charge, the evidence pertinent thereto being contained in the foregoing statement:

"It is your province and duty to determine under the evidence the length of time these attachment liens remained upon and continued operative upon the property attached."

To the giving of which charge the defendant did, then and there, before the jury retired, except.

33rd exception. And thereupon, the court instructed, on its own motion, the jury as follows, the evidence pertinent thereto being contained in the foregoing statement:

"There is a great deal of testimony in this case. I have made careful notes through the entire case, and yet there are questions of items, questions of amount, questions of computation, which it would be difficult for me to state, and I presume it would be difficult for you to carry in your minds, but there is no question of an actual amount of damages, and if you are satisfied in your
72 minds what the testimony will justify, it is not absolutely necessary for you to find a positive amount of damages; if you are satisfied that such damages and such amount have been fully proven. It is not necessary that an actual positive amount be determined by you to a mathematical certainty or nicety. You twleve gentlemen will retain in your general recollection the aggregate of the testimony in regard to about the amounts that have been testified to, and if you satisfy your minds and satisfy your con-

sciences that the testimony will justify you in finding on such a point so much as has been proven, that will be as near as the law requires." And the defendant did, then and there, before the jury retired, except to the following portion of said charge, to wit: "If you are satisfied in your minds what the testimony will justify, it is not absolutely necessary for you to find a positive amount of damages if you are satisfied that such damages and such an amount have been fully proven. It is not necessary that an actual positive amount be determined by you to a mathematical certainty, or nicety."

34th exception. And thereupon, the court at the request of the plaintiff, instructed the jury as follows:

"You will allow the plaintiff interest at eight per centum per annum upon every item of damage which you find the plaintiff sustained from the time you find such damages were sustained to the date of your verdict." And to the giving of such instruction the defendant did, then and there, before the jury retired, except.

35th exception. It was established by the testimony that on February 22nd, 1898, the plaintiff executed a mortgage on its mill plant to secure an issue of bonds to the amount of $50,000.00, and pledged the same to various creditors, including one Henry Weiler, a director of the company, to secure an indebtedness then due from the plaintiff to the amount of about $25,000.00, and that said mortgage bonds were outstanding until after June, 1899.

Whereupon, the court, at the request of the plaintiff, gave the jury the following instruction:

"The subject of indebtedness of plaintiff incurred after October 1st, 1897, and the subject of giving a mortgage upon its properties in February, 1898, is wholly immaterial in this case, and you will exclude the same from your consideration." And to the giving of such charge the defendant did, then and there, before the jury retired, except. And the jury found a verdict in said cause for the plaintiff in the sum of $10,880.

73 Whereupon, the court aforesaid, on the 8th day of February, 1900, at a term aforesaid, did render judgment in favor of the said plaintiff and against the said defendant in the sum of $10,895.05 and $— costs, as appears of record, and inasmuch as said several matters objected to, or insisted upon, and considered by the court, do not appear by the record of the findings and judgment aforesaid, the said defendant, by its attorneys, did then and there propose this, its bill of exceptions, to the said opinions and decisions of the said judge, and requested him to sign the same according to the form of the statute in such case made and provided, which is done this 15th day of March, A. D. 1900.

Signed and sealed the day and year last above written.

[SEAL.] JAMES W. LOCKE, *Judge.*

(Indorsed:) In the U. S. circuit court for the southern district of Florida. L. Bucki & Son Lumber Co. *vs.* Fidelity & Deposit Company of Maryland. No. 116, L. 35. Bill of exceptions. Filed Mar. 15, 1900. E. O. Locke, clerk.

In the Circuit Court of the United States for the Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND.

Know all men by these presents, that the Fidelity & Deposit Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, as principal, and the American Bonding and Trust Company of Baltimore City, and duly licensed under the acts of Congress of August 13th, 1894, to become sole surety upon bonds, as provided in said act, as surety, are held and firmly bound unto the L. Bucki & Son Lumber Company, a corporation, under the laws of the State of New Jersey, in the sum of twelve thousand ($12,000) dollars, for the payment whereof, well and truly to be made, they bind themselves, their successors and assigns, jointly and severally, firmly by these presents.

Signed and sealed on the 20th day of March, A. D. 1900.

The condition of the foregoing obligation is such, that whereas, the Fidelity and Deposit Company of Maryland, the principal above named, has sued out a writ of error from judgment in the amount of $10,895.04, in the circuit court of the United States for the
74 southern district of Florida, rendered on the 8th day of February, A. D. 1900, in favor of the plaintiff, and against the defendant, upon certain causes of action set forth in the plaintiff's declaration in the above-entitled case, in the circuit court of appeals for the fifth circuit of the United States, returnable before the said court on the 2nd day of April, A. D. 1900.

Now, if the said principal shall prosecute said writ of error to effect, and in case the said judgment should be affirmed, shall pay to the said L. Bucki & Son Lumber Company the amount of said judgment and the interest thereon and all costs and just damages for delay, then this obligation shall become null and void; otherwise shall remain of full force and virtue.

FIDELITY & DEPOSIT COMPANY OF MARYLAND.
[SEAL.] THOS. A. WHELAN, *Vice-President.*
Attest: HARRY NICODEMUS, *Ass't Secretary.*
AMERICAN BONDING AND TRUST COMPANY.
[SEAL.] JAS. BOND, *President.*
Attest: SAMUEL SHRIVER, *Secretary.*

(Documentary stamps.)

Taken and approved this 20th day of March, 1900, and it — ordered that the same shall operate as a supersedeas.

JAMES W. LOCKE, *Judge.*

(Attached.)

STATE OF MARYLAND, } ss:
City of Baltimore, }

On this 20th day of February, A. D. 1900, before the subscriber, a notary public of the State of Maryland, in and for the city of Baltimore, duly commissioned and qualified, came Thomas A. Whelan, vice-president, and Harry Nicodemus, ass't secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in, and who executed the preceding instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself, deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of the said company, and that the said corporate seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my official seal at the city of Baltimore, the day and year first above written.

FRED S. AXTELL,
[SEAL.] *Notary Public.*

75 STATE OF MARYLAND, } ss:
City of Baltimore, }

On this 20th day of February, A. D. 1900, before me, Howard Abrahams, the subscriber, a notary public for the State of Maryland, residing in Baltimore city, duly appointed to take proof and acknowledgment of deeds and other instruments, came James Bond, president, and Samuel H. Schriver, secretary, of the American Bonding and Trust Company of Baltimore City, to me personally known to be the individuals described in and who executed the preceding instrument, and they each duly acknowledged the execution of same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the preceding instrument is the corporate seal of said company, and that the said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said corporation.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal at the city of Baltimore, the day and year first above written.

HOWARD ABRAHAMS,
[SEAL.] *Notary Public.*

(Indorsed:) Supersedeas bond. Filed Mar. 20th, 1900. E. O. Locke, clerk.

In the United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The defendant in the above cause, The Fidelity and Deposit Company of Maryland, conceiving it is aggrieved by the judgment entered herein on the 8th day of February, 1900, by its attorney hereby applies for a writ of error from the said judgment to the United States circuit court of appeals for the fifth circuit, and a citation to the plaintiff, The L. Bucki & Son Lumber Company, and has filed herein an assignment of errors intended to be urged in said court, and the said Fidelity and Deposit Company of Maryland prays that a writ of error do issue in this cause, and a citation to the L. Bucki & Son Lumber Company; and that a transcript of the record, proceedings and papers, upon which the said judgment was entered,
76 duly authenticated, may be sent to the United States circuit court of appeals for the fifth circuit in accordance with law.

R. H. LIGGETT,
Attorney for Fidelity and Deposit Company of Maryland.

It is ordered that a writ of error as prayed for above be allowed, and also a citation to the L. Bucki & Son Lumber Company; it is further ordered that said writ of error shall operate as a supersedeas upon the defendant filing a bond with sufficient surety, to be approved by the court, in the sum of twelve thousand dollars ($12,000), conditioned that the said defendant shall prosecute said writ of error to effect, and in case the said judgment should be affirmed, shall pay to the said L. Bucki & Son Lumber Company the amount of said judgment and interest thereon, and all costs and just damages for delay.

JAMES W. LOCKE, *Judge.*

March 20th, 1900.

(Indorsed:) Defendant's application for writ of error and order allowing same. Filed Mar. 20th, 1900.

UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the fifth circuit, southern district of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The L. Bucki & Son Lumber Company, plaintiff, against The Fidelity and Deposit Company of Maryland, defendant, a manifest error hath happened to the great damage of the said Fidelity & Deposit Company of Maryland, as by its complaint appears. We being willing that error if any hath been, should be duly corrected and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the circuit court of appeals of the U. S. fifth circuit, together with this writ, so that you may have the same at New Orleans, La., on the second day of April, 1900, in the said circuit court of appeals to be then and there held, that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error,
77 what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 20th day of March, in the year of our Lord 1900.

[SEAL.] EUGENE O. LOCKE,
Clerk of the U. S. Circuit Court, Southern District of Florida.

Allowed by:
JAMES W. LOCKE, *Judge.*

(Indorsed:) Copy of writ of error lodged with clerk circuit court of U. S. so. dist. of Fla. for def't in error on 20th day of March, A. D. 1900. Eugene O. Locke, clerk. Filed Mar. 20, 1900.

UNITED STATES OF AMERICA, *ss:*

To the L. Bucki & Son Lumber Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the circuit court of appeals for the fifth circuit, of the United States, to be holden at New Orleans, La., on the second day of April, 1900, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of Florida, wherein The Fidelity and Deposit Company of Maryland, a corporation, is plaintiff in error, against you, The L. Bucki & Son Lumber Company, a corporation, defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned, entered on the 8th day of March, 1900, should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 20th day of March, in the year of our Lord, nineteen hundred.

[SEAL.] JAMES W. LOCKE, *Judge.*

Service of the foregoing citation accepted this 20th day of March, A. D. 1900.

H. BISBEE,
For Defendant.

(Indorsed:) Citation. Filed March 20th, 1900. E. O. Locke, clerk.

78 (*Clerk's Certificate.*)

United States Circuit Court, Southern District of Florida.

L. BUCKI & SON LUMBER COMPANY, Plaintiff,
vs.
FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant.

I, Eugene O. Locke, clerk of the above-mentioned court, do hereby certify that the foregoing pages numbered from one to 119, inclusive, constitute a true copy of the record, assignment of errors and all of the proceedings in the above-entitled cause, which is of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of above court this 28 day of March, A. D. 1900, at Jacksonville, in said district.

[SEAL.] EUGENE O. LOCKE, *Clerk*,
By LOUIS STARKE, *Deputy*.

79 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1899. May 29, 1900.

(*Extract from Minutes.*)

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND
vs.
THE L. BUCKI & SON LUMBER COMPANY. } No. 926.

This cause was regularly called this day and submitted to the court after argument by Mr. R. H. Leggitt for plaintiff in error and by Mr. H. Bisbee for defendant in error.

November Term, 1900. May 28, 1901.

(*Extract from Minutes.*)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
vs.
L. BUCKI & SON LUMBER COMPANY. } 926.

This cause came on to be heard on the transcript of the record, from the circuit court of the United States for the southern district of Florida, and was argued by counsel, in conjunction with cause No. 925, L. Bucki & Son Lumber Company *vs.* Fidelity & Deposit Company of Maryland, wherein the same questions were involed, and that case having been disposed of. It is now here ordered and adjudged by this court, that the writ of error sued out in this cause be, and the same is hereby dismissed.

It is further ordered and adjudged that the plaintiff in error, The Fidelity and Deposit Company of Maryland, and the surety on the writ of error bond herein, the American Bonding & Trust Company of Baltimore City, be condemned to pay the costs of this cause

in this court, for which execution may be issued out of said circuit court.

80 In the United States Circuit Court of Appeals for the Fifth Circuit.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
THE L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } 926.

Whereas by inadvertence there was omitted by the clerk of the circuit court of the United States for the southern district of Florida, from the transcript of the record in the above-entitled cause, a copy of the record of the judgment of the said circuit court of the United States in said cause, a certified copy whereof, under the seal of said circuit court of the United States accompanies this stipulation, it is thereupon stipulated and agreed by and between the parties to this action, that the above-mentioned certified copy of the record of the judgment of the circuit court of the United States for the southern district of Florida hereto attached, marked "A" and made a part hereof, shall become a part of the transcript of the record in this cause to be considered the same as if it had been originally incorporated in the said transcript.

(Signed) R. H. LIGGETT,
Counsel for Plaintiff in Error.

(Signed) H. BISBEE,
Counsel for Defendant in Error.

In the United States Circuit Court, Southern District of Florida.

THE L. BUCKI & SON LUMBER COMPANY
vs.
THE FIDELITY & DEPOSIT COMPANY OF MARYLAND.

In accordance with the verdict of a jury herein entered, it is considered by the court, that the plaintiff The L. Bucki & Son
81 Lumber Company do have and recover from the defendant The Fidelity & Deposit Company of Maryland, the sum of ten thousand, eight hundred and eighty and $\frac{00}{100}$ dollars ($10,880.00) damages in *his* behalf incurred, and fifteen and $\frac{04}{100}$ dollars interest ($15.04) to date as well as — costs by plaintiff expended. For which let execution issue.

February 8th, 1900.

Attest: EUGENE O. LOCKE, *Clerk.*

From judgment record U. S. circuit court "A" page 153.

United States Circuit and District Courts, Southern District of Florida.

I, Eugene O. Locke, clerk of the circuit court of the United States for said district hereby certify that the foregoing document of one

page is a true copy of judgment in the case of L. Bucki & Son Lumber Company *vs.* The Fidelity & Deposit Co. of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Jacksonville, in said district this 16th day of May, A. D. 1900.

EUGENE O. LOCKE, *Clerk.*

I, James W. Locke district judge, hereby certify that Eugene O. Locke whose signature appears above is, as he represents himself to be clerk of the United States circuit and district courts of said district and his attestations as such are entitled to full faith and credit, and that the preceding attestation by him is in due form.

Witness my hand and seal at Jacksonville Florida, this 16th day of May, A. D. 1900.

JAMES W. LOCKE, *Judge.*

82 NOTE.—The opinion of the court, and petition for rehearing covers both Nos. 925 and 926, and is *in* found in the record of the first-named case.

83 United States Circuit Court of Appeals for the Fifth Circuit.

I, Charles H. Lednum, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 82 pages, numbered from "*a*" to 81, inclusive, contain a true copy of the record and all proceedings had in the case of

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND, Plaintiff in Error,
vs.
THE L. BUCKI & SON LUMBER COMPANY, Defendant in Error. } 926.

as the same remains upon the files and records of said United States circuit court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 30th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

84 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Being informed that there is now pending before you a suit in which L. Bucki & Son Lumber Company is plaintiff in error, and Fidelity & Deposit Company of Maryland is defendant in error, No. 925, and Fidelity & Deposit Company of Maryland is plaintiff in

error, and L. Bucki & Son Lumber Company is defendant in error, No. 926, which suit was removed into the said circuit court of appeals by virtue of writs of error to the circuit court of the United States for the southern district of Florida, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States, do
85 hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of January, in the year of our Lord one thousand nine hundred and two.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

86 UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

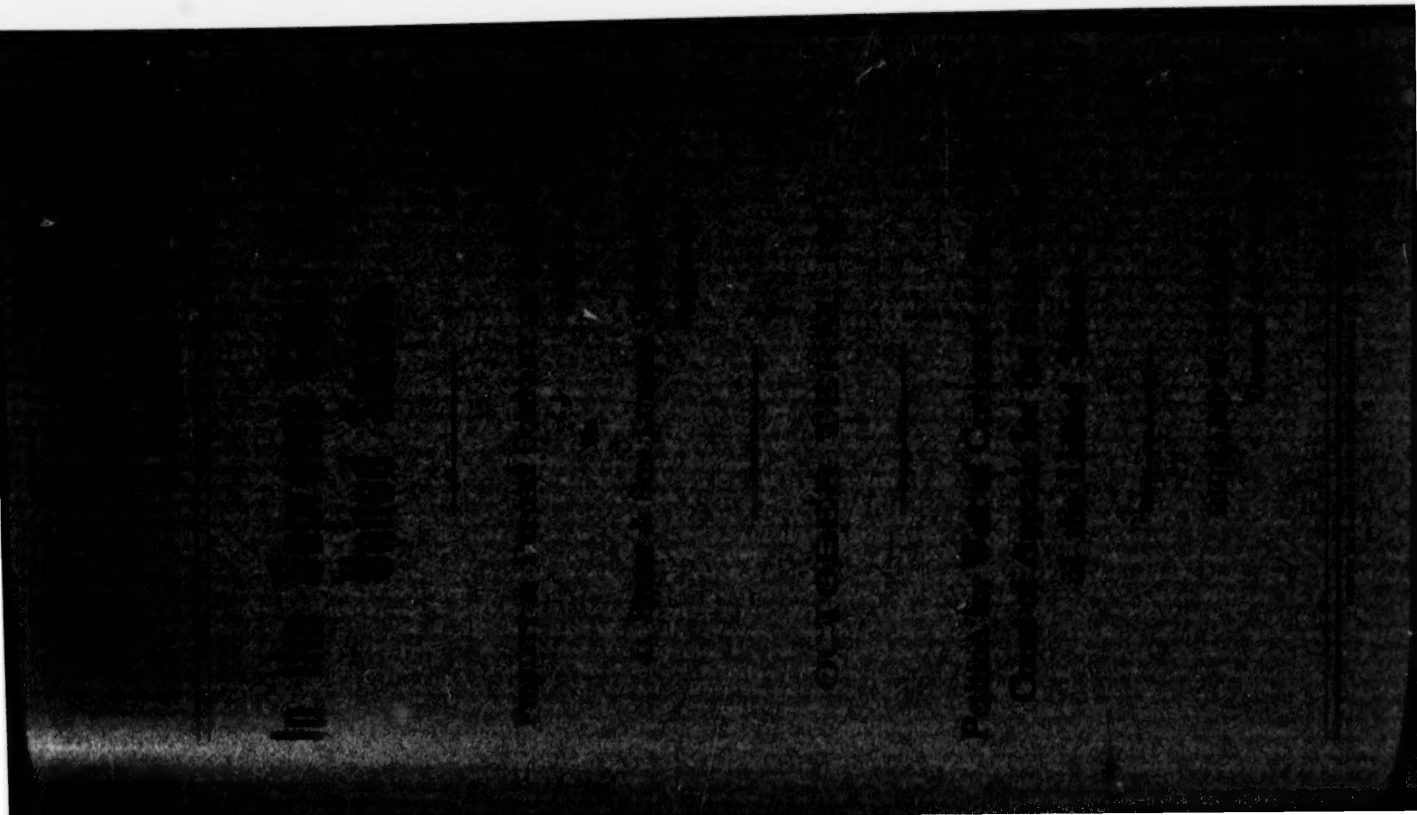
In obedience to the command of the within writ, and by direction of the judges of the United States circuit court of appeals for the fifth circuit, I, Charles H. Lednum, clerk of said court as a return to and in compliance with said writ, do herewith transmit to the honorable, the Supreme Court of the United States, a true, full and perfect transcript of the records and all proceedings had in said court in the cause wherein L. Bucki & Son Lumber Company is plaintiff in error, and Fidelity & Deposit Company of Maryland is defendant in error, numbered 925, and in the cause wherein Fidelity & Deposit Company of Maryland is plaintiff in error, and L. Bucki & Son Lumber Company, is defendant in error, numbered 926, as fully and completely as the same now remains of record in my office.

Given under my hand and the seal of said United States circuit court of appeals for the fifth circuit, at the city of New Orleans, Louisiana, this 30th day of January, A. D. 1902.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

CHARLES H. LEDNUM,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

[Endorsed:] File No. 18,366. Supreme Court of the United States. No. 220. October term, 1902. The Fidelity & Deposit Co., of Maryland *vs.* The L. Bucki & Son Lumber Co. Writ of certiorari and return. Filed Feb'y 3, 1902.



In the Supreme Court

OF THE

UNITED STATES.

Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
L. Bucki & Son Lumber Company,
Respondent.

H. Bisbee, Esq., attorney for the L. Bucki & Son Lumber Company, will please take notice that on Monday, January 6th, 1902, or as soon thereafter as counsel can be heard, I shall present the following petition to the Supreme Court of the United States, praying that a writ of certiorari may issue to the Circuit Court of Appeals for the Fifth Circuit of the United States, requiring that Court to send up the record of the judgment and proceedings in the case of the L. Bucki & Son Lumber Company *versus* the Fidelity & Deposit Company of Maryland, lately pending on writ of error in the Circuit Court of Appeals, for inspection and review by the Supreme Court, and that at the same time I shall present to the Court a certified copy of the record of said cause, and ten copies thereof, in conformity to the rules of the Supreme Court.

RICHARD H. LIGGETT,
Attorney for Petitioner.

Received copy of the foregoing notice, and of the petition, this 23rd day of December, 1901.

.....
Attorney for Respondent.

IN THE SUPREME COURT OF THE
UNITED STATES.

Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
The L. Bucki & Son Lumber Company,
Respondent.

Petition for writ of Certiorari, requiring the Circuit Court of Appeals for the Fifth Circuit of the United States to certify to the Supreme Court for its review and determination the case of the L. Bucki & Son Lumber Company, Plaintiff in Error, *versus* the Fidelity & Deposit Company of Maryland, Defendant in Error.

STATEMENT OF CASE.

The petitioner, the Fidelity & Deposit Company of Maryland, hereinafter designated the "Fidelity Company," respectfully shows unto this honorable Court as follows:

The action of the L. Bucki & Son Lumber Company, respondent, hereinafter designated the "Bucki Company," was originally instituted against your petitioner in the Circuit Court for Duval County, Florida, and thereafter removed to the United States Circuit Court for the Southern District of Florida by your petitioner.

This action was founded upon two attachment bonds, one for $20,000 and the other for $150,000, executed by the petitioner as surety in two proceedings in attachment instituted by the Atlantic Lumber Company against the L. Bucki & Son Lumber Company in the Circuit Court for Duval County, Florida, on October 1st, 1897, and which were afterward removed into the United States Circuit Court for the Southern District of Florida by the said Bucki Company. These bonds were payable to the Bucki Company, and conditioned for the "payment of all costs and damages which it

might sustain in consequence of said attachments being improperly sued out."

A brief history of these two attachment suits is as follows: On the 1st day of October, 1897, the Atlantic Lumber Company commenced two different actions against the Bucki Company in the Circuit Court for Duval County, Florida, and as ancillary to one of said actions, it sued out an attachment for $9,980.80, and gave an attachment bond for $20,000, and in the other of said suits sued out a writ of attachment for $75,000, and filed an attachment bond for $150,000.

These attachment proceedings, as above stated, were subsequently removed into the United States Circuit Court for the Southern District of Florida, where the writs of attachment were dissolved on the ground that they had been improperly sued out.

Soon after the dissolution of these writs of attachment, the Bucki Company instituted this action against your petitioner, the Fidelity Company, in the Circuit Court for Duval County, Florida, which suit your petitioner afterward removed to the United States Circuit Court for the Southern District of Florida.

This action went to trial on the plea of non damnificatus, and the Court permitted the Bucki Company to introduce evidence concerning the employment of attorneys to secure the dissolution of the attachment, and in that action instructed the jury as follows:

"In making up your verdict, you will find and assess the total amount of damages the plaintiff has sustained, exclusive of reasonable attorneys' fees for services rendered by the plaintiff's attorneys in preparing for, and on the trial of the motions to dissolve the two writs of attachment; and in addition to the amount so found, you will also find and assess separately such sum of money as upon the evidence you believe to be a reasonable compensation for the services rendered

by the plaintiff's attorneys in preparing for the trial of, and on the trial of the two motions to dissolve the attachments, and in resisting the efforts of the Atlantic Lumber Company to have the judgment dissolving such attachments reversed in the United States Circuit Court of Appeals, and in the Supreme Court of the United States. The Court has prepared the form of your verdict as follows:

"We, the jury, find for the plaintiff, and assess its actual damages, exclusive of attorney's fees, at $_____. And if the Court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $_____ as a reasonable and just fee for the services proven.

_____

Foreman."

And thereupon the jury returned the following verdict:

"We the jury find for the plaintiff, and assess its actual damages, exclusive of attorneys' fees, at $10,880.00.

And if the Court be of the opinion that as a matter of law the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500 as a reasonable and just fee for the services proven.

Foreman, WILLIAM MICKLER."

And thereupon the plaintiff, the Bucki Company, moved the Court to enter judgment against the Fidelity Company in favor of the plaintiff upon the said verdict for the full amount thereof, including the sum of $7,500, found by the jury as aforesaid, as a reasonable and just fee for the services rendered by plaintiff's attorneys in obtaining a dissolution of the said attachments. But the Court refused to include in the said judgment the said amount of attorneys' fees so found by the jury, to which refusal the Bucki Company ex-

cepted, on the ground that the plaintiff had a legal right to have the amount found due for attorneys' fees embraced in the said judgment.

And thereupon the Court, at the term aforesaid, rendered judgment against the Fidelity Company in the sum of $10,895.04. Each party reserved a bill of exceptions, and sued out separate writs of error from this judgment. The cases were heard together.

Among the errors assigned by the Bucki Company, was one relative to the action of the Court in refusing to enter judgment on the special verdict for attorneys' fees, and a majority of the Judges of the Circuit Court of Appeals being of the opinion that attorneys' fees were recoverable on the bond, it was ordered by that Court that the judgment of the Circuit Court be amended by striking out the words "Ten" and "Eight," and inserting the words "Eighteen" and "Three," thereby making the judgment against the Fidelity Company $18,395.04 instead of $10,895.04, and that the judgment be affirmed as amended. Rec. 140. A certified transcript of the record in this case is presented along with this petition, and it is prayed that it may be considered as a part hereof.

This opinion and judgment of the Court was concurred in by Judges Pardee and McCormick, and Judge Shelby filed a dissenting opinion, in which he expressed his concurrence with the view taken by the Judge of the Circuit Court in regard to attorneys' fees. The opinion of the Court (Rec. 145) and the dissenting opinion of Judge Shelby (Rec. 158) are contained in the record, and it is respectfully requested that they be read as part hereof.

The Action of the Appellate Court Presents This Important Question.

Did the Court of Appeals, in awarding attorneys' fees as part of the damages, give judgment in accordance

with the law as expressed in the opinion of this Court?

The Supreme Court of the United States has uniformly held that attorneys' fees cannot be recovered as damages.

Oelrich vs. Spain, 15 Wallace, 211.

And it was upon this ground that the Circuit Court refused to allow a recovery for attorneys' fees.

At the time these attachment bonds were given, there was no decision of the Florida Supreme Court relating to the subject, except that of Wittick vs. O'Neal, 22 Fla., 593, where the Supreme Court of that State, repudiating the doctrine of Oelrich vs. Spain, 15 Wallace, 211, held that attorneys' fees might be recovered as damages on an injunction bond.

The Supreme Court of Florida in that case did not treat the subject as one of local law, or as a matter of statutory construction, but as a question of general jurisprudence, or common law.

The case of Gonzales vs. DeFuniak Havana Tobacco Company, 41 Fla., 471, decided December 6th, 1899, over two years after the bonds were given by your petitioner, was an action upon an attachment bond, but the question of attorneys' fees for services rendered in defense of the attachment proceedings was not involved, and the declaration of the Court therein was a mere expression of opinion as to the weight of the common law authorities on the subject. (Page 477.)

Your petitioner will undertake to show in the brief filed herewith that this is purely a question of common law, or of general jurisprudence, and in no sense a question of local law or statutory construction, and that the doctrine of Oelrich vs. Spain, 15 Wallace, 211, was applicable to the question, and should have been applied by the Circuit Court of Appeals.

It is most respectfully submitted that it would be most just and highly proper for this court to revise the

judgment of the Circuit Court of Appeals in this case, through the medium of a writ of certiorari. There is at present a marked conflict on this subject between the decisions of this Court and the decision of the Circuit Court of Appeals, and until the decisions of the two tribunals are brought into harmony, there must always be great doubt as to the nature of the obligation of a surety on an attachment bond, a doubt which is accentuated by the dissenting opinion of Judge Shelby, of the Court of Appeals, and the conclusion of Judge Locke, of the Circuit Court.

The maintenance of uniformity among the decisions of the Federal Courts was one of the objects which Congress had in view when it devised the writ of certiorari, and its exercise for that purpose is highly advantageous to persons entering into contracts of this kind, and advantageous to the whole system of subordinate Courts. An authoritative declaration from the Supreme Court on this subject is of great importance to your petitioner, as well as to the many other surety companies, which together with your petitioner execute a very large number of attachment bonds in every State in the Union, and until this apparent conflict is settled, your petitioner and other sureties cannot know the exact measure of their responsibility, especially upon bonds given beyond the jurisdiction of the Circuit Court of Appeals for the Fifth Circuit. Surety companies being non-residents are in the large majority of cases entitled to have their liability adjudicated by the Federal Courts. This Court has already taken occasion to say:

"In the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under Section 6 for such supervision on our part as would tend to avert diversity of judgments, and guard

against inadvertence of conclusion in controversies involving weighty and serious matters."

In re Woods 143 U. S., 206.

And your petitioner points out that in this particular case your petitioner, at the time it executed the bonds, had the right to have the measure of its responsibility determined by the Federal Courts, and in accordance with the decisions of the supreme tribunal of that system, and without reference to a contrary decision of a Florida Court upon a question of general jurisprudence, or even a decision upon a local question, rendered after your petitioner's liability had attached.

As stated above, at the time these bonds were given, there was no Florida decision relating to the measure of damages on an attachment bond, and the only one now existent contains a mere dictum on that subject.

Wherefore your petitioner prays that this honorable Court may be pleased to grant a writ of certiorari in this cause, to the Circuit Court of Appeals for the Fifth Circuit, to bring up this cause for review and determination, and for such other and further proceedings as this Honorable Court may direct, and that an order may be entered staying the enforcement of the judgment against your petitioner pending the action of this Court.

R. H. LIGGETT,
Attorney for Petitioner.

STATE OF FLORIDA,
DUVAL COUNTY. ss.

D. U. Fletcher, of lawful age, being by me first duly sworn, says that he is a local director and agent of the Fidelity & Deposit Company of Maryland, the above named petitioner; that he has read the foregoing peti-

tion, and that he is informed and believes that the statements of fact therein contained are true.

D. U. Fletcher

Subscribed and sworn to
before me this 24
day of November, 1901.

Russell E. Calcord
Notary Public, State of Florida.

I hereby certify that I have examined the foregoing petition, and that in my opinion the same is well founded, and that the prayer of the petition should be granted by the Court.

R. H. LIGGETT,
Counsel for Petitioner.

No. [illegible]

In the Supreme Court of the United States.

Filed Jan. 10, 1902.

THE FIDELITY & DEPOSIT COMPANY OF MARYLAND,

Petitioner,

vs.

THE E. BUCUS & SON LUMBER COMPANY,

Respondent.

OCTOBER TERM, 1901.

Brief for Petitioner on Application for Writ of Certiorari.

RICHARD E. LAGGETT,

Counsel for Petitioner.

In the Supreme Court

OF THE

UNITED STATES.

The Fidelity & Deposit Company of Maryland,
Petitioner,
vs.
The L. Bucki & Son Lumber Company,
Respondent.

BRIEF FOR PETITIONER ON APPLICATION FOR WRIT OF CERTIORARI.

Attorneys' Fees Not Recoverable on an Attachment Bond.

In this connection it will be shown, that while the Florida statute has prescribed the form of an attachment bond, it has left the measure of damages upon such bond to be determined by the principles of the common law, and that according to the doctrine of the common law, as expounded by this Court, attorney's fees can no more be recovered upon an attachment bond than damages for injury to credit.

Section 1646 of the Revised Statutes of Florida provides as follows:

"No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into bond, with at least two good and sufficient sureties,

payable to the defendant, in at least double the sum or debt demanded, conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment."

The statute goes no further than to prescribe the form of the contract of indemnity to be given to the defendant in attachment, it does not undertake to fix the measure of damages, or to prescribe the effect of that contract, but leaves that to be determined by common law principles.

In this connection, Judge Shelby, in his dissenting opinion, has this to say:

"This statute creates no rule as to damages that would include counsel fees, and merely provides for the giving of a statutory recognizance, which is not the foundation of a right of action, but security only for the payment of damages. The damages referred to are such as are legally recoverable." Rec. 164, at bottom.

Or as said by the Supreme Court of Alabama in Hundley vs. Chadwick, 109 Alabama, text 105,

"The bond which the law requires for suing out an attachment is intended as an indemnity or security to the owner of the property attached, against an abuse of the process, and accords to him the same measure of relief against the principal and his sureties, in case it was wrongfully sued out, as he would have had or been entitled to, if the taking had been without pretense of legal authority."

That is to say, the measure of damages upon the bond is the same as in an action of trespass, except as to exemplary damages—which can never be recovered on a bond, and which are not claimed in the declaration.

The measure of damages in an action of trespass is regulated wholly by the common law—and it devolves

upon the Federal Courts to exercise an independent judgment in determining what that is. Said this Court in Lake Shore &c. Ry. Co. vs. Prentice 147 U. S. 106, in speaking of the allowance of *exemplary damages*: "This is a question, not of local law, but of general jurisprudence, upon which this Court, in the absence of express statute regulating the subject, will exercise its own judgment uncontrolled by the judgments of the Courts of the several States."

This is no less true of actual than of exemplary damages.

This Court, in Flanders vs. Tweed, 15 Wallace 453, has already held that attorneys' fees are not an element of actual damages in an action of trespass. That was an action of trespass for the illegal seizure of property, in which the plaintiff sought to recover the sum of $6,000 expended by him in the prosecution of sequestration writs for the recovery of the possession of his property. That case is decisive of the precise question involved here. There, Flanders, as the result of the trespass of Tweed, found it necessary to institute sequestration suits for the recovery of the possession of his property, and in a subsequent action of trespass against Tweed, it was held that he could not recover as damages the attorneys' fees paid out in the prosecution of those sequestration suits.

In the case at bar, the respondent asserts that it found it necessary to employ attorneys to secure the restoration of its property, and its release from the lien, and it claims the right to recover the amount of the attorneys' fees paid in this suit upon the attachment bond, which is virtually the same contention as as that made in Flanders vs. Tweed; and I assert that the obligation of the surety upon the attachment bond is not even so great as that of a defendant in an action of trespass; and if attorneys' fees cannot be regarded as an element of damages in the latter case,

they should not be deemed such an element in the former case.

The case of Oelrich vs. Spain, 15 Wallace, 211, is an instance of the application of this doctrine in a suit on a bond conditioned like the one in the case at the bar. There the condition of the bond was "To pay all costs, damages and charges that shall be occasioned by said suit." And it is worthy of note that the counsel who maintained the right to recover these fees contended as follows: "The claim here is founded on the *express terms* of the obligation, which is to pay, as well the costs, damages and charges, as shall occur in said Circuit Court, as *all costs, damages and charges as shall be occasioned* by said writ of injunction. These 'costs, damages and charges' superadded, are not referable to the Circuit Court, for they are specially provided for, and if they do not cover counsel fees, they are meaningless." Brief of counsel, pg. 223.

The Court held that attorneys' fees could not be recovered on the bond, and made the following observations:

"In actions of trespass, where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant, if the plaintiff be defeated. Why should a distinction be made between them? In certain actions ex delicto, vindictive damages may be given by the jury. In regard to that class of cases, this Court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expended for counsel fees, but the amount of these fees cannot be taken as the measure of punishment, or as a necessary element in its infliction.'"

And the Court adds: "The point here in question has never been expressly decided by this Court, but it

is clearly within the reasoning of the case last referred to, and we think it is substantially determined by that adjudication. In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party, there is danger of abuse. * * * We think the principle of disallowance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law, and sound public policy.

Oelrichs vs. Spain, 15 Wallace, text 231.

The learned Judge who delivered the opinion of the Court below, calls attention to the fact that in the case of Oelrichs vs. Spain, there was no formal motion to dissolve the injunction, and that it was dissolved after a hearing on the merits. The Supreme Court, however, did not base its conclusion upon this circumstance, but laid down a general and broad rule, which would apply equally to a case where an injunction is dissolved upon formal motion, as well as to a case where an injunction is dissolved as the result of a decree entered at a final hearing, and it is impossible to perceive any greater reason for allowing attorneys' fees in the one case than in the other, for it is inconceivable that such a result should attend the filing of a mere motion.

There are two Federal decisions, and only two, which relate directly to the right to recover attorneys' fees upon an attachment bond, and in both of these the right to recover such fees was denied. The first is the case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 812, in which the Court struck allegations of special damages resulting from the payment of attorneys' fees, and held that the word "costs" employed in the statute included only the statutory docket fee.

The second case is that of Jacobus vs. Monongahela Railroad, 35 Fed. Rep., 395, in which the Court carefully considered the subject of the allowance of attorneys' fees as damages on an attachment bond, and upon the authority of Oelrich vs. Spain held that they could not be recovered.

In Tiblier vs. Alford, 12 Fed. 262, which was an *action of trespass* for *malicious attachment*, counsel fees seem to have been treated as an element of damages.

Counsel fees were likewise allowed in Blunk vs. Atchison, etc. R. Co., 38 Fed. Rep., 317, which was likewise a case of malicious prosecution.

These cases do not apply to the case under consideration, and may be said to fall under the exception mentioned in Day vs. Woodworth, where it was held that attorneys' fees could be indirectly allowed as exemplary damages.

In Kennedy vs. Meacham, 18 Fed. Rep., 312, which was an action of trespass for wrongful attachment, founded on the Tennessee Statute, the Court held that attorneys' fees were not recoverable, page 313. It is to be observed that the Court instructed the jury in that case; that under the facts of that case, only actual and no punitive damages could be recovered.

The Federal Courts have consistently refused to allow counsel fees, not merely in actions at law, but also in Admiralty and Patent cases.

Arcombel vs. Wiseman, 3 Dallas, 306.
Margaret vs. The Connestoga, 2 Wallace, Jr., 116.

In this latter case, Justice Grier, while apparently admitting the discretionary power of the Admiralty Court to allow counsel fees, expressed his strong repugnance to its exercise, saying that the principal seemed to belong rather to the hall of the Cadi than to the judgment seat of the Court.

See also The Baltimore, 8 Wallace, 377.
Blanchard's G. T. F. vs. Warner, 1 Blatch, 258.
Stimson vs. The Railroads, 1 Wallace, Jr., 164.

Florida Decisions.

In the case of Wittick vs. O'Neal, 22 Fla., 593, the Supreme Court of Florida held that attorneys' fees could be recovered on an injunction bond, conditioned to repay *all damages* the defendant might sustain. This decision was founded on general reasoning, and the principles of general jurisprudence, and the Supreme Court of Florida admitted that its decision was at variance with the doctrine of Oelrich vs. Spain.

The case of Gonzales et al. vs. DeFuniak Havana Tobacco Co., 41 Fla., 471, was an action upon an attachment bond. The attachment bond had been given for the purpose of suing out an ancillary writ of attachment in an action of assumpsit, and in the suit upon the bond, it was sought to recover attorneys' fees expended in defending this action of assumpsit. The Court held that they could not be recovered. In passing upon the question, the Court said:

"By the great weight of authority, attorneys' fees and other expenses incurred in relation to an attachment, or in procuring its dissolution, will be allowed as damages in actions upon attachment bonds. The fees and expenses incurred in defending the principal suit cannot be allowed, in the absence of a statute, or a stipulation in the bond to that effect."

It will be observed that the Florida Court here views the subject of the allowance of attorneys' fees as part of the damages, as a question purely of general jurisprudence, and as one that is to be controlled by the rules of general law.

It is conceived that these two Florida cases show that this question is in no sense one of local law or statutory construction, and that it is a question purely as to what is, under the principles of the common law, the measure of damages upon an attachment bond.

Even though the question involved in this case had been directly drawn in question in the case last mentioned, and even though that opinion could be deemed a construction of the statute, or a deliverance upon a question of local law, it would not control the assessment of damages upon this bond executed before the decision in question was rendered.

"When contracts and transactions have been entered into and rights have accrued thereon under a particular state of the decisions, or where there has been no decision of the State tribunals, Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S., text 33, 34.
Bartholomew vs. City of Austin, 85 Fed. Rep., 359.

But as previously pointed out, what is said in that case relative to the measure of damages upon an attachment bond is a dictum, and as such is not binding upon this Court.

No expression of opinion by a State Court upon a question of statutory construction or local law is binding upon a Federal Court, unless the matter of the opinion was expressed relative to some point which it

was necessary for the Court to decide, in order to grant the particular relief asked for in the case.

Carroll vs. Carroll, 16 Howard, 275, text 287.

Murray vs. Chicago and N. W. Ry. Co., 92 Fed. Rep., text 870.

Venice vs. Murdock, 92 U. S., 501.

"While Federal Courts follow the construction of a statute by the Courts of a State, they are not required to adopt a construction based on the implications of a judicial opinion."

Cæsar vs. Capel, 83 Fed. Rep., 403.

In the opinion of the Court of Appeals rendered by Judge McCormick, the learned jurist in effect contends that what would otherwise be deemed a dictum is relieved from that stigma by being expressed in the syllabi or headnotes of the case, and relies upon section 1327 of the Revised Statutes of Florida, wherein it is provided as follows:

"The Judge of the Supreme Court of this State delivering the opinion of the Court shall prepare and make a syllabus or statement of the points or principles intended to be decided by the Court, which shall be filed with the opinion and published in the reports at the beginning of the case, in lieu of that usually prepared by the reporter."

Unfortunately for the view expressed by the learned Judge, the Supreme Court of Florida, in the case of Hart et al. vs. Stribling, 25 Fla., 435, held as follows:

"Where the Judge who writes the opinion of the Court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point is an *obiter dictum* and is binding upon no one."

As observed above, the Florida decisions treat this question of the measure of damages upon an attachment bond as one which is to be determined by the

principles of the common law, and the propriety of this is shown by the language of the statute which prescribes the form of the bond, and the history of the lsgislation on the subject in the State of Florida.

The Question is Not One of Local Law, or of Statutory Construction, but one of General Law.

The bonds sued on are in the ordinary form of a contract, and their construction is to be determined by the rules of the common law, and they may be enforced by suit, in any jurisdiction where the obligors may be found.

The case of Mulvane vs. Tullock, 58 Kansas 632, illustrates this idea. That was a suit brought in a State Court upon an injunction bond given in certain proceedings in a Federal Court, and as the bond was filed in a suit pending in the Federal Court, it was contended that the measure of damages on the bond must be controlled by the rules of law adhered to in that Court, and that under the doctrine of Oelrich vs. Spain 15, Wallace 211, attorneys' fees could not be recovered. But the Supreme Court of Kansas decided otherwise, and said:

"The bond executed is in the ordinary form, is in the nature of a contract; and the liability of the obligors depends not upon the Federal Constitution or Congressional Act, but on the proper interpretation of the bond itself. In the absence of a statute fixing the measure of damages, or limiting the recovery, we think the bond should be viewed in the light of an independent contract, and is to be interpreted by the general principles of the common law. It is not a mere incident of the injunction proceeding, nor can this, which is an ordinary action at law, be regarded as auxiliary to the proceeding in the Federal Court. Being an independent contract, and actionable in any

State where service upon the sureties could be obtained, the interpretation of the forum applies."

To the same effect:

Mitchell vs. Hawley, 79 Cal., 301.

Railroad Co. vs. Shipley, 1 Mo. App., 254.

8 Mo. App., 122.

The bond required in attachment proceedings is designed as a source of indemnity to the defendant, and the measure of damages in a suit thereof is the same as in an action of trespass, except as to exemplary damages.

Hundley vs. Chadwick, 109 Ala., text 105.

The measure of damages in the action of trespass was regulated wholly by the common law, and there is no statute which controls the subject. The measure of damages in a suit upon these bonds in a Federal Court, is to be determined according to that Court's notions of what the common law is.

Lake Shore &c. Ry. Co. vs. Prentice, 147 U. S., 106.

This Court has already determined that attorneys' fees are not recoverable as actual damages in an action of trespass.

15 Wallace, 453.

"The Judiciary Act declaring local laws rules of decision in Federal Courts, is limited in its application to laws strictly local, and the positive statutes of the State, and to the construction thereof adopted by the local tribunals, and to the rights and titles to things having a permanent locality, and does not extend to contracts and other instruments of a commercial nature."

Swift vs. Tysen, 16 Peters, text 18, 19.

As observed above, this bond constitutes a contract which may be enforced in any locality, and in any

jurisdiction, and does not come within the classification mentioned in Swift vs. Tyson.

"This Court determines for itself the construction of contracts without reference to the previous adjudications of a State Court upon the subject."

Pana vs. Bawler, 107 U. S., 529.

"This Court does not follow State Courts in their construction of a will, or of any other instrument, as they do in the construction of statutes."

Lane vs. Vick, 3 Howard, 471, approved in Barber v. Pittsburg &c. R'y Co., 166 U. S., 100.

It has been suggested that because this bond was executed in conformity with the provisions of a statute, that therefore the State decisions should control. If this contention needs refutation, it is found in the case of Lane vs. Vick, for the will therein construed was executed in conformity with a State statute, and the title to the land could not have been passed by the will in the absence of that statute, since the common law makes no provision for wills of real property; and moreover, the will affected property of a fixed and permanent character, and any suit founded upon such a will must have been local, whilst a transitory action may be maintained upon the attachment bond in any jurisdiction where the obligors are found.

In the Florida decisions quoted, there was no pretense that this was a local question, or that their conclusions were based on the statute. Neither ingenious counsel nor the learned Judge who delivered the opinion of the Court of Appeals, has undertaken to show by *reasoning*, that the question here involved is a local question, or that the decision of the Supreme Court of Florida is one of statutory construction. They have merely asserted the fact, and have not attempted to demonstrate its truth. In this connection I call attention to Venice vs. Murdock, 92 U. S.,

501, in which this Court said: "It is argued, however, that the New York decisions are judicial constructions of statutes of that State, and that therefore they would furnish a rule by which we must be guided. The argument would have force, if the decisions in fact presented a clear case of statutory construction, but they do not. They are not attempts at interpretation. * * * They assert general principles, etc." This language could be aptly applied to the decisions of the Supreme Court of Florida referred to.

In respect to the contention that this is a local question, enough has probably been said already, and the authorities heretofore cited are doubtless sufficient, but I call attention to the additional cases of Murray vs. Chicago and N. W. Ry. Co., 92 Fed. Rep., text 870, and Beard vs. Independent District of Pella City, 88 Fed. Rep., 376, which give a clear idea as to when a subject will be deemed a local question.

In the first named case, the Circuit Court of Appeals for the Eighth Circuit said: "For more than a century the Federal Courts, in the absence of a statute, or other obligatory rules of decision, have had recourse to the common law for rules of decision in the trial of cases in those courts, and have, in cases where that furnished an appropriate rule of decision, rested their judgment upon it."

In that case, the Court, following the Supreme Court of the United States, held that a cause of action founded upon a fraud was barred by the Iowa Statute of Limitations, because not especially excepted, and that the decision of the Iowa Supreme Court to the contrary was not binding, because not amounting to a construction of the statute.

In Beard vs. Independent District of Pella City, supra, an attempt was made to fasten a trust upon funds held by a Receiver of an insolvent bank, by virtue of a Statute of the State, and the Court held

that certain State decisions which declared that money received under the statute in question was a trust fund, and retained that character in the hands of a third party, were not to be deemed as a construction of the statute, as the statute did not deal with that question, but that the decision was founded upon principles of general law, about which the Federal Court would exercise its independent judgment.

The Decision of the Circuit Court of Appeals Finds No Support in the Language of the Bond.

The significant words of the bond are "costs and damages." The fact that the word *damages* would have been broad enough to embrace *costs* in its meaning, makes the use of the latter word significant, and shows that the Legislature used the word "damages" in a special and limited sense, and as applicable to some other class of damages than those to which the word *costs* is applicable.

The word "costs" is used to signify the expenses incurred by the defendant in the attachment proceedings, and the word "damages" is used with reference to the injuries sustained from the levy upon the defendant's property.

That the word "costs" cannot be deemed to include attorneys' fees is conclusively shown by the history of legislation in the State of Florida on that subject, and also by the well understood meaning which the word has. In 1828, the Legislature provided that "in all cases the party recovering judgment shall recover also his legal costs and charges, which shall be included in the judgment." And this provision has remained in force from that day to this, and appears as section 1304 of the Revised Statutes.

The words "costs and charges," used in this statute, have been uniformly interpreted during a period of

seventy-two years to embrace only the taxable fees of the officers of the Court, and have never been construed to embrace attorneys' fees, and at no time during the history of the State have attorneys' fees been allowed by statute to one party against another, except in certain special proceedings brought to enforce statutory liens and recover the value of stock killed by railroads, with the exception of the period between July, 1870, and March, 1873, when the New York Code was in force in Florida.

It is evident that the word "costs" is used in the same sense in the attachment bond as in the Act of 1828, and that it refers only to the costs which the defendant would have the right to have taxed in his favor in attachment proceedings. This is the generally accepted meaning of the word.

Anderson's Law Dictionary, 267.
Melancon vs. Robichaud, 19 La., 357.
Markham vs. Ross, 73 Ga., 105.
Apperson vs. Insurance Co., 38 N. J. L., 388.
Henry vs. Murphy, 54 Ala., 246.
McDonald vs. Page, Wright (Ohio), 121.
People vs. R. R. Co., 63 Hun., 632.

The fact that the word "costs" had a well-understood meaning, and that it does not include attorneys' fees, shows that the Legislature never contemplated them as being embraced in the terms of the obligation, for the Legislative mind having been directed to the subject of the expenses incurred in the defense of an attachment suit, and the fact that only taxable costs were provided for, excludes the idea that attorneys' fees were intended to be included within the meaning of the word "damages."

And it would seem to be clear that the Legislature intended to include in the meaning of the word "damages" such elements of compensatory damages only as

were then recognized by the common law as embraced in the measure of damages in an action of trespass.

The action having been removed from the State to the Federal Court, the law requires it "to proceed in the same manner as if it had been originally commenced in that Court."

Summing Up.

1st. At the time these bonds were given no decision had been rendered by the State Court relating to the measure of damages upon an attachment bond. The case of Wittick vs. O'Neal, 22 Fla., relating to the measure of damages upon an injunction bond, was decided upon general principles, and that decision is admitted by the Florida Court to be in direct conflict with Oelrich vs. Spain. All the Federal authorities existing at the time of the giving of the bonds were opposed to the allowance of attorneys' fees as damages upon an attachment bond.

2d. The decision of Gonzales vs. Tobacco Company, 41 Fla., was rendered after the attachment bond had been given, and subsequent to the institution of the suit upon these bonds, and what is said in that case in regard to the right to recover attorneys' fees incurred in the defense of attachment proceedings, is a mere *dictum*, and the expressions of the Court on this subject relate to what the Court conceived to be the rule under the common law, or general law, and the Court in that case did not attempt to construe the statute or to lay down a rule of local law.

3d. The statute does not undertake to prescribe the measure of damages, but leaves that to be determined according to the rules of the common law, and the bond required to be given was designed to secure to the defendant in attachment the payment of such damages as he would have been entitled to recover,

had the seizure of his property been without pretense of legal authority.

Under these circumstances judgment should have been rendered according to the doctrine of the Federal decisions, the authority of which has been denied upon the pretense that a local question was involved.

There was no State decision relating directly to this subject at the time these contracts were entered into, and even though a State decision bearing directly upon the subject, and amounting to a construction of the statute, had been rendered subsequently, still should judgment have been rendered in accordance with the doctrine of the Federal Courts.

Burgess vs. Seligman, 107 U. S., text 33, 34.

Bartholomew vs. City of Austin, 85 Fed Rep., 359.

The State decisions themselves treat this subject as a question of general jurisprudence, and it would be abhorrent to the doctrine that the Federal Courts are Courts of equal and concurrent jurisdiction, to disregard the views expressed upon this subject by the supreme tribunal of that system, and give judgment according to the notions of the State Court.

It is respectfully submitted that the Circuit Court and Judge Shelby, of the Circuit Court [illegible] were right in holding that attorneys' fee[s] [illegible] been disallowed, and that this Court sho[uld] [illegible] the authority of its decisions to be [illegible] refinement. It is likewise submitted th[at] [illegible] between this decision of the Circuit Cou[rt] [illegible] and the opinions of this Court, and the general importance of the question involved, call for a review of this judgment by the Supreme Court, and that a writ of certiorari should issue as prayed.

Respectfully submitted,

RICHARD H. LIGGETT,

Counsel for Petitioner.

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It is respectfully submitted that the Circuit Court and Judge Shelby, of the Circuit Court of Appeals, were right in holding that attorneys' fees should have been disallowed, and that this Court should not permit the authority of its decisions to be ~~talked away~~ dissipated by refinement. It is likewise submitted that the conflict between this decision of the Circuit Court of Appeals and the opinions of this Court, and the general importance of the question involved, call for a review of this judgment by the Supreme Court, and that a writ of certiorari should issue as prayed.

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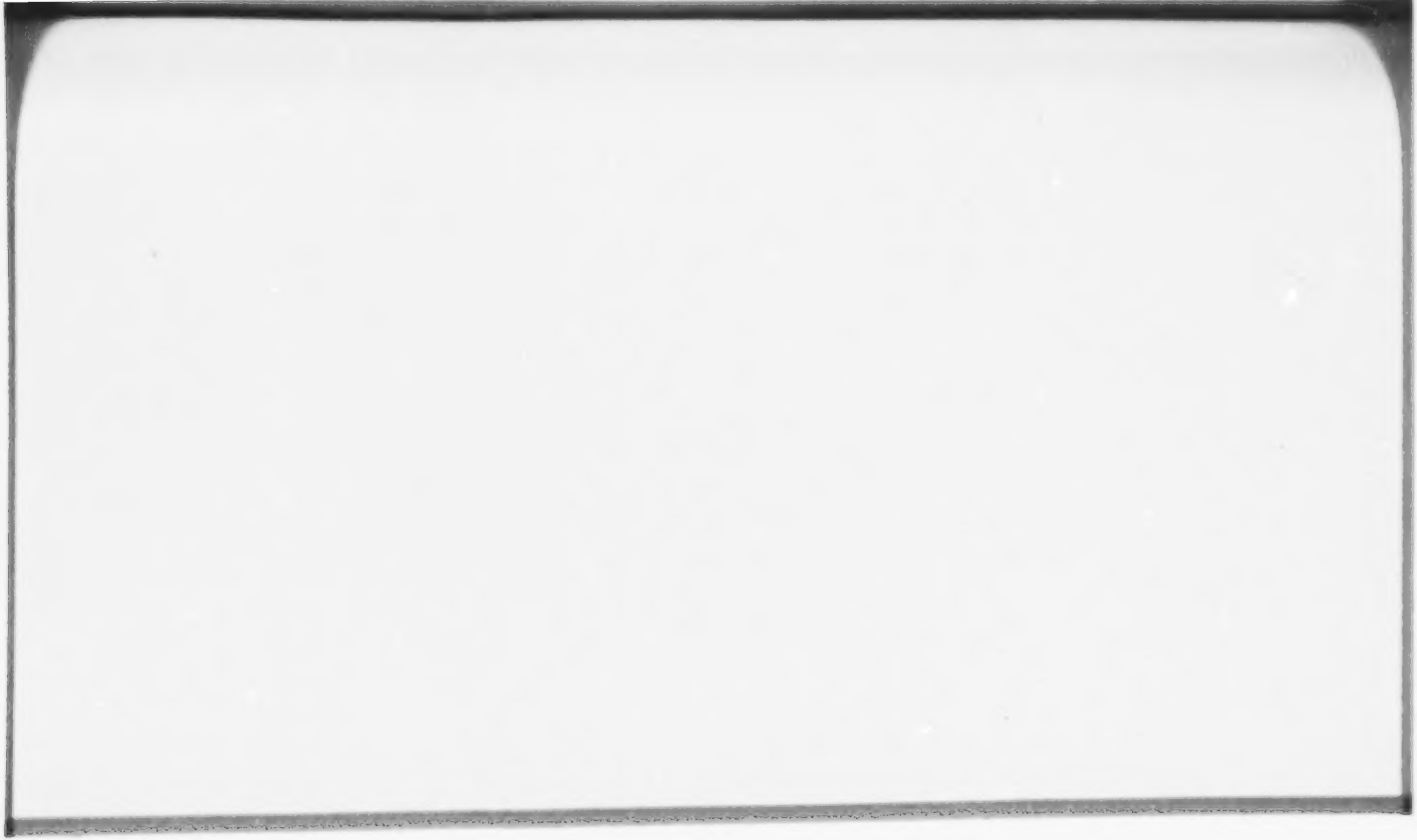
RICHARD H. LIGGETT,

Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Office Supreme Court U. S.
FILED
MAR 9 1903
JAMES H. McKENNEY,
Clerk.

No. 220.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY.

ON WRIT AND CROSS-WRIT OF CERTIORARI.

BRIEF OF COUNSEL FOR THE FIDELITY AND DEPOSIT COMPANY.

RICHARD H. LIGGETT,
WINFIELD LIGGETT,
Counsel.

THE H. & W. B. DREW COMPANY JACKSONVILLE FLA. 100000

In the Supreme Court of the United States.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND
vs.
THE L. BUCKI & SON LUMBER COMPANY, ON CROSS WRITS OF CERTIORARI.
No. 220.

BRIEF FOR THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

The part first of this brief will be devoted to the specifications of error of the Fidelity Company and the second part to those of the Bucki Company, and as a rule the Fidelity Company will be referred to as the defendant and the Bucki Company as the plaintiff.

PART FIRST.

STATEMENT OF CASE.

Prior to Oct. 1, 1897, the Atlantic Lumber Co. had been engaged in furnishing the Bucki Company with logs with which to operate its saw mill, at the rate of 2,000,000 feet per month, but on that day cancelled the contract on account of a breach thereof by the Bucki Company, and brought one action at law against it for $200,000 damages, and as ancillary, sued out an attachment for $75,000, against the property of the Bucki Company, and also another action at law to enforce a log lien for the sum of $9,980.80, claimed to be due for logs delivered, and sued out an ancillary attachment for this amount also. The smaller attachment was levied on certain logs and lumber, upon which the lien was claimed to exist, and the larger attachment for $75,000 was levied on all the

personal property of the Bucki Company and upon its mill plant. The mill was a fixture, or a part of the realty, and the writ did not operate to dispossess the Bucki Company of that (Rec., 184). The Fidelity Company became the surety upon the attachment bonds. These actions were removed into the United States Circuit Court for the Southern District of Florida, and afterwards, on November 1st, 1897, the smaller writ of attachment was dissolved, and on February 14, 1898, the larger writ was dissolved. In June, 1897, the Atlantic Lumber Company sued out a writ of error in the larger suit and obtained an order superseding the order dissolving the attachment for $75,000. The Circuit Court of Appeals finally disposed of this writ of error in January, 1899, by affirming the judgment of the lower Court.

Soon after the dissolution of these writs of attachment the Bucki Company brought the present action against the Fidelity Company upon the two attachment bonds referred to in the Circuit Court for Duval County, Florida, from which Court it was removed into the United States Circuit Court for the Southern District of Florida.

The Bucki Company obtained judgment, and each party reserved a bill of exceptions and removed the Record into Court of Appeals by writ of error. The Court of Appeals modified the judgment and affirmed it as modified. Afterwards each party applied for and was allowed a *writ of certiorari* by this Court.

In the declaration filed in this case the plaintiff claimed the following damages:

Damages due to the employment of attorneys to secure the dissolution of the attachment, and damages for loss of credit, interruption of business and loss of profits.

The defendant moved the Court to strike all of these allegations from the declaration (Rec., 18, 19), and the Court ordered the allegations relative to damages arising from the *employment of attorneys*, and from *injury to credit* to be stricken (Rec., 19, 20), which was done accordingly on February 16, 1899 (Rec., 22). Afterwards the Court restored these allegations "subject to any subsequent ruling and charge of the Court to the jury" (Rec.,

27). The action went to trial on the plea of not damaged as alleged in the declaration (Rec., 24).

At the trial the Court admitted evidence relative to the value of the services rendered by counsel for the Bucki Company in connection with the attachment proceedings, and instructed the jury to find a special verdict as to the value thereof (Rec., 114, 115).

The jury found a general verdict for $10,880 and a special verdict for $7,500 on account of attorneys' fees (Rec., 28). Afterwards the Bucki Company moved for judgment for the amount of both of these verdicts, and the Court entered judgment for the amount of the general verdict, but refused to give judgment for the amount of the special verdict (Rec., 116).

The Bucki Company excepted to the refusal to include the attorneys' fees, and assigned it for error in the Court of Appeals (Rec., 44). The Court of Appeals reversed the action of the Circuit Court in this particular, and amended the judgment of the Circuit Court by including the amount of the special verdict, and affirmed the judgment as amended (Rec., 119).

Judge Shelby, of the Court of Appeals, dissented, and the opinion of the Court and the dissenting opinion appear in the Record at pages 121 to 142.

The action of the Court of Appeals in allowing these attorneys' fees constitutes the basis of the defendant's first specification of error.

During the progress of the trial of the case the plaintiff was allowed to prove over defendant's objection that at the time of the levy of these writs of attachment, it was engaged in the business of manufacturing lumber at the rate of about 100,000 feet per day, and over like objection, the president of the plaintiff company was permitted to testify that for the six months preceding October 1, 1897, plaintiff's profits in its business had been as follows: For March, $8,722; April, $7,966; May, $8.154; June, $3,269; July, $5,067; August, $1,932, and September, $422.

The defendant excepted to the admission of this evidence on the grounds that it was immaterial, and because neither injury to business nor loss of profits could be re-

covered, and because profits realized prior to October 1, 1897, were not a proper criterion of what might be made afterwards (Rec., 183).

The bill of exceptions recites that it was "established" at the trial that on October 1, plaintiff had on hand various orders for lumber which it was unable to completely fill. That on October 9 the sheriff surrendered 1,250,000 feet of lumber to plaintiff upon forthcoming bond; that on October 11 he surrendered the possession of the logs in the boom to the plaintiff to be sawed up, and, being indemnified, permitted plaintiff to ship the lumber away from the mill as fast as vessels arrived; that the mill ran at its full capacity from October 11 to November 7, 1897, during which time all logs in the boom were sawed up; that on November 4, 1897, plaintiff gave the sheriff a forthcoming bond which released all the logs, lumber and personal property levied on; that prior to December 28, 1897, all lumber on hand October 1, 1897, and all subsequently manufactured from logs then on hand had been shipped and delivered by plaintiff to parties in New York and Boston with whom plaintiff had contracts on October 1, except about 2,000,000 feet of old or second-class lumber, which on December 28, 1897, was seized under the attachments of other creditors; *"that there was no evidence to show, or tending to show, that the defendant got any less for this lumber than it would have received had no attachments been levied, or that the lumber deteriorated while in the sheriff's possession, or was injured in any way; and that it was established that the price of lumber improved after October* 1, 1897."

It was also established that "the saw mill plant was a fixture, and that the sheriff never took possession of it, and only levied the attachment so as to create a lien on it" (Rec., 186, 187).

Section 1651 of Revised Statutes provides that "the levy of a writ of attachment shall not operate to dispossess the tenant of any lands or tenements, but a levy on real estate shall bind the property attached."

It appears from these declarations of the bill of exceptions that no profits were lost on the logs and lumber attached and that they were not injured in any way, and

that consequently the evidence in regard to profits made in the past could have no proper relation to the seizure and detention of this property. The defendant accordingly, at the close of the testimony, moved the Court to exclude the evidence in regard to profits made prior to October 1, 1897, but the Court denied the motion (Rec., 98). In view of the above, there was only one purpose for which this testimony could have been retained, and that was to support the claim of the plaintiff that but for the levy of these writs it would have been able to continue in business, and make a profit thereby; and viewed from that aspect the testimony was clearly illegal, especially under the circumstances of this case which were as follows:

It was established by the evidence that prior to October 1, 1897, the Bucki Company had been supplied with logs by the Atlantic Lumber Company under a contract which required the delivery of 2,000,000 feet of logs per month at a fixed price (Rec., 91), but that on October 1 the Atlantic Lumber Company cancelled this contract and refused to deliver more logs (Rec., 186); that after the logs on hand October 1, 1897, and about 400,000 feet subsequently purchased had been sawed up, the plaintiff had to finally shut down its mill, because of its inability to procure the logs from any other source with which to operate its mill (Rec., 186, 187).

It was admitted by the Bucki Company that as the result of the cancellation of this contract, it would have been necessary for it to have embarked in the logging business itself in order to supply its mill, and it proved by one Murphree that such an enterprise would have required an investment of $150,000 to $250,000 (Rec., 87).

It was established by the evidence and not disputed that in September, 1897, the credit of the Bucki Company was very bad; that its commercial paper had gone to protest from time to time during the summer of 1897; and that a piece of its commercial paper for $5,340 had been under protest for over a month prior to October 1, 1897 (Rec., 86, 188 and 70).

The Bucki Company proved by one Stevens that its mill plant was worth from $5,000 to $75,000, according to the use that could be made of it (Rec., 87).

There was evidence tending to show that the Bucki Company received the gross sum of $39,385 for the lumber shipped from the mill after October 1, 1897, which of course makes no allowance for the cost of operating the mill subsequently to that date (Rec., 201).

It was also established that the plaintiff owed $64,000 and had but $112.50 in cash (Rec., 87).

It would appear from this that the profits made prior to October 1, 1897, were in no sense a proper criterion of what might have been made afterwards. Prior to that date the Bucki Company had a steady supply of logs at a fixed price. After that time its ability to procure the logs depended upon the procurement of the large sums of money necessary for that purpose, and had the money been procured the cost of the logs would have been a matter of mere conjecture.

There was testimony tending to show that prior to October 1, 1897, the Bucki Company was negotiating with Shepard, Morse & Co., of Boston, for an advance of $25,000 upon the security of its mill plant and lumber, the same to be repaid by the delivery of lumber at the existing market price. This, of course, amounted to a mere sale of lumber, the price being paid in advance, and as the Bucki Company sold all of its lumber immediately after October 1, 1897, and upon a rising market, it is not perceived how that fact affects the question.

These facts show that the testimony in regard to profits made prior to October 1, 1897, should have been stricken out altogether.

As already stated, on the day before the case was submitted to the jury, defendant moved the Court to strike out all testimony relative to injury to business, loss of profits, etc., and the Court made the following order:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that, under the testimony introduced, any damages arising from the con-

sideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber, and the supply of timber lands; all testimony to the damage to credit, loss of profits, and all evidence relative to the market price of lumber subsequent to the attachment.

"*That in regard to the profits plaintiff's mill had been making prior to October* 1, 1897, *be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment,* and the motion be denied in all other respects" (Rec., 98).

In a colloquy between the Court and counsel, the Court said that he intended to permit the previous profits to be considered for the purpose of showing the damages sustained while the property was in the possession of the sheriff, and that the evidence showed it was released on October 11 (Rec., 102).

The defendant's counsel argued the case on this hypothesis, but when the Court came to charge the jury, it altogether departed from this limitation

It instructed the jury that it was a question of fact for them to determine upon all the evidence in the case, whether the plaintiff would have been able to continue in business if these attachments had not been levied, and if they should find that the plaintiff could have done so, they should then award to the plaintiff such an amount of damages as they, upon the evidence, felt convinced the plaintiff had sustained as a direct and proximate consequence of the attachments; that they, the jury, were the exclusive judges as to the effect of the attachment on the business of the plaintiff (Rec., 174); that the jury were the exclusive judges of the amount of the damages the plaintiff had sustained, and that among the damages to be considered by them were those caused by the interruption of plaintiff's business and from disabling the plaintiff to deliver lumber it had agreed to deliver (Rec., 174, 175).

The Court instructed the jury also to award damages for the entire period that the lien of the attachment re-

mained on the lumber and logs, and that it was the province of the jury to determine the length of time the attachment lien continued operative on the property attached (Rec., 174).

These charges were duly excepted to, and will be stated in full hereafter, and they are mentioned here for the purpose of showing that the jury was permitted to consider this testimony in regard to profits for any purpose they saw fit, and to make it the basis of the wildest speculation. The plaintiff had been allowed to show that the attachment lien on the mill had been kept alive by a supersedeas while the case was in the Court of Appeals, from March, 1898 to January, 1899, and the Court instructed the jury that though the personal property had been released on forthcoming bonds, that yet said property was deemed to be in the custody of the law (Rec., 202).

The Court also permitted the plaintiff to prove and recover certain special damages not claimed in the declaration, as follows:

Damages due to the employment of four watchmen at the rate of $75.00 per week to watch the mill during the time it was under the lien of the attachment, notwithstanding that the mill was a fixture and that the sheriff never took possession of it, and although it was being operated during most of that period by the plaintiff and its lessee. The admission of this testimony was duly excepted to, and is made the basis of the 10th specification of error in this Court.

The plaintiff was also permitted to prove that certain of its employees were employed by the year (Rec., 193), and instructed the jury that they should consider whether any of the time of such employees had been lost as the result of the attachment, and to award damages accordingly. This charge was duly excepted to, and is made the basis of the 11th specification of error.

It appeared that after the lapse of seven working days the mill started up and finally shut down November 16 for want of logs to saw (Rec., 193). Under these circumstances the defendant requested the Court to give a charge limiting the recovery of damages on account of

time lost by employees to the seven working days in October, but the Court refused this charge and such refusal is made the basis of the 12th specification of error.

The plaintiff proved that shortly after the levy of these writs of attachment it procured the release of all the personal property, by giving the sheriff two forthcoming bonds, and proved that after the attachment for $75,000 had been dissolved the defendant sued out a writ of error to the Court of Appeals and superseded the order of dissolution, and that the case was pending in the Court of Appeals until January 1899, when the judgment of the lower Court was affirmed (Rec., 200).

The Court likewise permitted the plaintiff to prove that in May, 1899, this defendant applied to the Supreme Court for a writ of certiorari in the attachment case. Upon these facts the Court instructed the jury, in substance, that notwithstanding the execution of the forthcoming bonds the property was still presumed to be in the custody of the law and remained subject to the liens, and that the plaintiff was bound to have the property forthcoming for re-delivery to the sheriff in case he should demand it, and that the plaintiff could not sell the property and give a good title to it, and that if the plaintiff did sell the lumber "in contemplation of law, the plaintiff held the proceeds of such sales in its hands, and had the legal right to retain the proceeds of such lumber in its hands to pay any judgment that might be recovered against it, * * * until such lien of the attachments ceased to exist." And the Court instructed the jury to award damages to the plaintiff for the entire length of time the lien remained on the property, and instructed the jury that it was their "province and duty" to determine how long the liens continued operative on the property (Rec., 202, 203).

These charges, containing these new and startling doctrines, are made the basis of the 13th to 17th specifications of error, inclusive. The plaintiff had sold all this lumber prior to December 28, 1897 (Rec., 201), and the defendant offered to prove that plaintiff had made immediate use of the proceeds, but the Court declined to admit the evidence (Rec., 185). Such refusal was

duly excepted to and is made the basis of the 18th specification of error.

The plaintiff was likewise permitted over defendant's objection to prove that it gave a mortgage upon its mill plant to secure the surety company that executed the forthcoming bond for $100,000, and that the mortgage was not released until June 6, 1899. The defendant duly excepted to the admission of this evidence (Rec., 183), and the ruling of the Court is made the basis of the 19th specification of error.

The plaintiff, over the objection of the defendant, was permitted to introduce evidence tending to show that prior to October 1, 1897, the plaintiff had had negotiations with Shepard, Morse & Co., of Boston, for the loan of $25,000, to be secured by a mortgage on the mill plant and certain boards thereafter to be manufactured, and that as a part of such proposed agreement the said Shepard, Morse & Co. were to take a million feet of boards at the then existing market price. The defendant duly excepted to the admission of this evidence (Rec., 182), and the ruling is the basis of the 9th specification of error.

The Circuit Court specially charged the jury to decide from the evidence whether the attachment defeated the consummation of this contract (Rec., 190).

There were several other matters which were made the subject of exceptions and assignments of error, which will be stated in another place.

SPECIFICATIONS OF ERROR.

I.

The Circuit Court of Appeals erred in reversing the decision of the Circuit Court disallowing the recovery of attorneys' fees incurred in defending the attachment as an element of damages to be recovered on the bond, and the Court of Appeals erred in amending the judgment of the Circuit Court by including therein the amount of such attorneys' fees, as found by the jury in its special verdict (Rec., 119).

II.

The Circuit Court erred in permitting the plaintiff to prove the profits of its mill between March 1, 1897, and October 1, 1897, and to prove that such profits had been as follows: $8,722.40 for March; $7,966 in April; $8,154.48 in May; $3,269.81 in June; $5,067.48 in July; $1,932.12 in August; and $422 in September. And the Court of Appeals erred in not sustaining the assignment of error on this point.

The admission of this evidence was the basis of the ninth exception (Rec., 183), and of the tenth assignment of error in the Court of Appeals (Rec., 173).

III.

The Circuit Court erred in giving the following charge to the jury:

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties caused by these attachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties in consequence of the attachment, because, as the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business even if the attachments had not been issued and levied. This is a question of fact for you to determine upon all the evidence in the case, and if you believe, from all the evidence in the case, that if these attachments had not been issued and levied upon the plaintiff's properties, it, the plaintiff, would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained, as a direct and proximate consequence of these attachments." And the Court of Appeals erred in not sustaining the Fidelity Company's assignment of error based on this charge. This charge was the basis of the Fidelity Company's 15th exception (Rec., 188), and of the 17th assignment of error in the Court of Appeals (Rec., 174).

IV.

The Circuit Court erred in giving the following charge to the jury:

"The jury are the exclusive judges as to the effect of the writs of attachment upon the business of the plaintiff. That is to say: When you consider any item of damages in this case, you are the sole judges as to whether the writs of attachment and the levy of the same directly and proximately caused the damage and injury, or whether there was some other intervening cause of the damage or injury, independent of the attachment, that would have caused the damage if the attachment had not been issued."

And the Court of Appeals erred in not sustaining the assignment of error on this point. This charge constituted the Fidelity Company's 17th exception (Rec., 189), and 19th assignment of error (Rec., 174).

V.

The Circuit Court erred in giving the following charge to the jury:

You are the exclusive judges as to the facts of this case. You are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequences of the issuing of these writs of attachment. These damages consist of two general consequences:

"1st. * * * [The exception was taken to the following paragraph:]

"2d. All consequential damages, that is, all damages caused by the interruption of the plaintiff's business, either by disabling plaintiff to operate its mill, or by disabling it to deliver timber and lumber it had agreed to deliver prior to October 1, 1897, if you believe from the evidence that the direct and proximate effect of such attachment caused such interruption of the plaintiff's business."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge.

This charge constituted the basis of the 19th exception (Rec., 190), and of the 21st assignment of error (Rec., 175).

VI.

The Circuit Court erred in giving the following instruction to the jury:

"It is the right and province of the jury to decide from the evidence whether or not these writs of attachment prevented the performance of any contract with Shepard, Morse & Co. for the loan of money, or the delivery of lumber, and the damages sustained by the plaintiff for such nondelivery, and it is your right and duty to decide, upon the evidence, whether or not these writs of attachment prevented the plaintiff from delivering any lumber to Degnen, McLean & Co., or to E. B. Hunting & Co., which plaintiff, prior to October 1, 1897, had contracted to deliver, and if you find such prevention of deliveries, to award such damages as the evidence justifies."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 18th exception (Rec., 190) and of the 20th assignment of error (Rec., 174).

VII.

The Circuit Court erred in refusing to give the jury the following charge at the defendant's request:

"The Court instructs the jury that they shall allow the plaintiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1, 1897, if such inability to fill orders was due to the fact that the plaintiff was unable to buy the logs from which to cut the lumber."

And the Court of Appeals erred in not sustaining the assignment of error based on the refusal of this charge. The refusal of this charge constituted the 20th exception (Rec., 192), and the 22d assignment (Rec., 175).

VIII.

The Circuit Court erred in charging the jury as follows:

"Another element of damages claimed by plaintiff is that the attachment interrupted its business, and by such interruptions, and consequences thereof resulting from the attachment, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff had agreed to furnish prior to October 1, 1897; and such losses consist of certain amounts that the purchasers of the lumber had to pay to supply what they had purchased of the plaintiff in excess of the contract price they had agreed to pay plaintiff. The Court instructs you that the defendant is liable for all such losses, if any resulted as a direct consequence of the attachments."

And the Circuit Court erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 17th exception (Rec., 189), and of the 18th assignment of error Rec., 174).

IX.

The Circuit Court erred in admitting evidence tending to show that on October 1, 1897, the plaintiff was negotiating with the Shepard Morse Lumber Co. for the loan of $25,000 to the plaintiff, to be secured by a mortgage upon plaintiff's mill and boards thereafter to be manufactured, and for the purchase of boards at the rate of 1,000,000 feet per year for a period of three years at the then existing market price, and the Court of Appeals erred in not sustaining the assignment of error on this point.

The admission of this evidence was made the basis of the seventh exception (Rec., 182), and of the 7th assignment of error in the Court of Appeals.

X.

The Circuit Court erred in permitting the plaintiff to prove over defendant's objection that during the time the mill was under attachment it employed four watchmen to watch the mill, whom plaintiff paid $75.00 per week.

The admission of this testimony was the basis of the defendant's 13th exception (Rec., 184), and 14th assignment of error in the Court of Appeals (Rec., 173).

XI.

The Circuit Court erred in giving the jury the following charge:

"Another point is the damages claimed for salaries of the officers and employees of the Bucki Company for the time of their enforced idleness, that is, the time they continued on salaries, and on account of the granting of the writs of attachment, were suspended from active operations. You have heard the testimony upon that, and you will determine just how far the Bucki Company suffered in damages on account of the time that their employees were compelled to remain idle and earned nothing, although they were on wages."

And the Court of Appeals erred in not sustaining the assignment based on this charge. This charge was the basis of the 21st exception (Rec., 193), and of the 24th assignment (Rec., 175).

XII.

The Circuit Court erred in refusing to give the following charge at defendant's request:

"The jury are instructed that the inquiry in regard to the loss of time by the employees shall be limited to the period between October 1, 1897 and October 11, 1897, and that no damages can be allowed for any time lost after October 11, 1897."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. The refusal of this charge constituted the 22d exception (Rec., 194), and the 25th assignment (Rec., 176).

XIII.

The Circuit Court erred in giving the jury the following charge:

"The giving of the forthcoming bonds did not discharge the lien of the attachment upon the property attached, and the plaintiff, after obtaining possession of the logs and lumber, could not sell and dispose of the same and give a good title to the purchaser, free and clear of the attachment liens without assuming any risk

of the property being demanded or damages being entailed."

And the Court of Appeals erred in not sustaining the assignment of error based on this point. The giving of this charge was made the basis of the 28½ exception (Rec., 202), and of the 32d assignment of error in the Court of Appeals.

XIV.

The Circuit Court erred in giving the jury the following charge:

"After the giving the forthcoming bonds for the personal property, to-wit, logs and lumber levied on, the plaintiff held such property as bailee for the sheriff, and was bound to deliver such property back into the sheriff's possession whenever such sheriff demanded the possession of such property for the purpose of enabling the sheriff to sell the same to satisfy any judgment the Court might render in the attachment suit."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge constituted the basis of the 29th exception (Rec., 202), and of the 33d assignment of error (Rec., 178).

XV.

The Circuit Court erred in giving the jury the following charge:

"If the plaintiff sold such property after giving such forthcoming bonds in contemplation of law, the plaintiff held the proceeds in its hands, and had the legal right to hold such proceeds in its hands to pay any judgment that might thereafter be rendered against it in the suits in which the attachments were issued, until such lien of the attachment ceased to exist."

And the Circuit Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 30th exception (Rec., 203), and of the 34th assignment of error in the Court of Appeals (Rec., 178).

XVI.

The Circuit Court erred in giving the jury the following charge:

"The Court instructs you to award damages to the plaintiff which it sustained by reason of or in consequence of the levy of the attachments upon all the timber and lumber and logs, and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber, lumber and logs, considering any deduction from such damages from the fact that the forthcoming bonds or indemnity bonds were given by the plaintiff."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 31st exception (Rec., 203), and of the 35th assignment of error in the Court of Appeals.

XVII.

The Circuit Court erred in giving the jury the following charge:

"It is your province and duty to determine, under the evidence, the length of time these attachment liens remained upon and continued operative upon the property attached."

And the Court of Appeals erred in not sustaining the assignment of error based on this charge. This charge was the basis of the 32d exception (Rec., 203), and of the 36th assignment of error in the Court of Appeals.

XVIII.

The Circuit Court erred in sustaining the plaintiff's objection to the following question propounded by the defendant to Charles L. Bucki, president of the plaintiff company:

"Q. What application was made of the proceeds of this lumber that was sold from the mill after October 1, 1897?"

The purpose of the question being to show that the plaintiff made use of the proceeds of lumber immediately

on its receipt, and that plaintiff was not embarassed in its use by reason of the forthcoming bonds.

And the Court of Appeals erred in not sustaining the assignment of error based on the exclusion of this evidence. This ruling of the Court was the basis of the 14th exception (Rec., 185), and of the 15th assignment of error in the Court of Appeals (Rec., 173).

XIX.

The Circuit Court erred in permitting the plaintiff to prove over defendant's objection that on November 4, 1897, it executed a mortgage on its mill plant to secure the Surety Company that executed the forthcoming bond, and that this mortgage was not released until June 6, 1899.

And the Court of Appeals erred in not sustaining the assignment of error based on the admission of this evidence. The admission of this evidence constituted the 10th exception (Rec., 183), and the 11th assignment of error in the Court of Appeals (Rec., 173).

XX.

The Circuit Court erred in giving the jury this charge:

"If you are satisfied in your own minds what the testimony will justify, it is not absolutely necessary for you to find a positive amount of damages if you are satisfied that such damages and such amounts have been fully proven. It is not necessary that an actual, positive amount be determined by you to a mathematical certainty or nicety."

And the Court of Appeals erred in not sustaining the assignment of error predicated on this charge. This charge constituted the basis of the 33d exception (Rec., 204), and of the 37th assignment of error.

THE EXCEPTIONS AND SPECIFICATIONS OF ERROR RAISE SIX PRINCIPAL QUESTIONS, AS FOLLOWS:

1. The liability of the surety for attorneys' fees.
2. The liability of the surety for damages due to

conjectural loss of profits, growing out of injury to credit and consequent interruption of business.

The second to seventh specifications relate to this subject and will be discussed together.

3. The liability of the surety for losses on collateral contracts (Eighth Specification).

4. The liability of the surety for wages paid during the time the mill was under the lien of the attachment to watchmen employed by plaintiff (10th specification).

5. The liability of the surety for the wages of employees of the plaintiff, whose services were lost by reason of the suspension of business. The eleventh and twelfth specifications relate to this subject.

6. Whether there is a conclusive presumption that property released on forthcoming bond is held for re-delivery to the sheriff, or else that the money arising from the sale thereof is held to meet the liability on the forthcoming bond, and that this presumption cannot be rebutted. The thirteenth to eighteenth specifications of error, inclusive, relate to this subject, and they will be discussed together.

FIRST SPECIFICATION OF ERROR.

ATTORNEYS' FEES NOT RECOVERABLE AS COSTS AND DAMAGES.

The bonds upon which this suit is brought are in the form prescribed by statute, viz:

"No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into bond, with at least two good and sufficient sureties payable to the defendant, in at least double the sum or debt demanded, conditioned to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment."

This provision was enacted by the Territorial Legislature on February 15, 1834, and appears as Section Ten in the Act of that date, and now appears as Section 1646 of the Revised Statutes of Florida (1892).

These Revised Statutes were simply a revision and consolidation of the general statutes of the state, and

they effected no change in the laws of the state, except by express provision.

Mathis vs. State, 31 Fla., 291.

Wright vs. Dressell, 140 Mass., 147.

The statute has prescribed the form of the bond, but it has not undertaken to specify the elements of costs and damages recoverable thereon. This was left to be determined by the rules and analogies of the common law which constitutes the body of the Jurisprudence of Florida.

Rice vs. R. R. Co., 1 Black., 358.

And the legislature is presumed to know what the rules and analogies of that system were.

Jones vs. Dexter, 8 Fla., 276-286.

The damages recoverable on an attachment bond for improperly suing out an attachment against property are the same that might be recovered in an action on the case for the seizure of such property without the pretense of legal authority that the writ furnishes.

Hundley vs. Chadwick, 109 Alabama Text, 105.

Hill vs. Rushing, 4 Alabama, 212.

This general statement is subject to the important modification that exemplary damages cannot be recovered on the bond.

Patton vs. Garrett, 37 Arkansas, 612.

Elder vs. Kutner, 97 California, 490.

1st Shinn on Attachment, pages 307, 664.

Drake on Attachment, Secs. 156, 175.

But no basis for the claim of exemplary damages is made in the declaration and hence it is not necessary to consider that question.

The determination of this question being dependent on common law principles, the Federal decisions should be first examined, for this is a subject upon which it is the right and duty of a Federal court to exercise an independent judgment. So spoke the Court in Railway Co. vs. Prentice, 147 U. S., 106, in reference to *exemplary* damages, and the same is no less true in regard to actual damages.

"In actions of trespass where there are no circumstances of aggravation, only compensatory damages can

be recovered, and they do not include the fees of counsel."

20½

2564

HISTORY OF THE FORM OF THE ATTACHMENT BOND.

By an act adopted August 13, 1822, by the governor and legislative council of Florida, section 2, it was provided:

"That every judge or justice of the peace, before granting any attachment, shall take bond and sufficient security, of the party for whom the same may be issued, in double the sum to be attached, payable to the defendant, for satisfying and paying all costs which may be awarded to the said defendant, in case the plaintiff, suing out such attachment, shall be cast in his suit, and all damages which shall be recovered against the said plaintiff, for his suing out such attachment, which bond shall be by the said judge or justice returned to court, with the attachment, and the party entitled to such costs or damages may thereupon bring suit and recover."

In 1834 the governor and council adopted the form now prescribed, as stated at page 19 of the brief.

ance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Text, 231; approved in Tullock vs. Mulvane, 184 U. S., Text 572.

be recovered, and they do not include the fees of counsel."

Day vs. Woodworth, 13 Howard, 370.

In Flanders vs. Tweed, 15 Wallace, 453, this Court again held that attorneys' fees are not an element of actual damages in an action of trespass. That was an action of trespass for the illegal seizure of property, in which the plaintiff sought to recover the sum of $6,000, expended by him in the prosecution of sequestration writs for the recovery of the possession of his property. That case is decisive of the precise question involved here. There, Flanders, as the result of the trespass of Tweed, found it necessary to institute sequestration suits for the recovery of the possession of his property, and in a subsequent action of trespass against Tweed, it was held that he could not recover as damages the attorneys' fees paid out in the prosecution of those sequestration suits.

In the case under consideration the Bucki Company asserts the right to recover the amount of fees paid for the services of an attorney employed to recover the possession of its property, which is the same contention made by Flanders. The fact that the action is founded on a *contract* to pay all damages can make no difference in principle. In the Flanders case the *law imposed* on Tweed the duty of paying all damages which the law recognized as elements of compensation, and in this case the Fidelity Company agreed to pay all damages which the law regarded as elements of compensation. The only difference is in the nature of the obligation from which the right springs.

The case of Oelrich vs. Spain, 15 Wallace, 211, is an instance of the aplication of this doctrine in a suit on a bond. There the condition of the bond was "to pay all costs, damages and charges that shall be occasioned by said suit."

The Court said, "We think the principle of disallowance rests on solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

Text, 231; approved in Tullock vs. Mulvane, 184 U. S., Text 572.

There are two federal decisions, and only two, which relate directly to the right to recover attorneys' fees upon an attachment bond, and in both of these the right to recover such damages was denied.

The first is the case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 812, in which the Court struck allegations of special damages resulting from the payment of attorneys' fees, and held that the word "costs" employed in the statute included only the statutory docket fee.

The second is that of Jacobus vs. Monongahela R. R., 35 Fed. Rep., 395, in which the Court carefully considered the subject of the allowance of attorneys' fees on an attachment bond, and upon the authority of Oelrich vs. Spain held that they could not be recovered.

The Federal Courts have consistently refused to allow counsel fees, not merely in actions at law, but also in admiralty and patent cases.

> Arcambel vs. Wiseman, 3 Dallas, 306; The Baltimore, 8 Wallace, 377; The Margaret vs. The Connestoga, 2 Wallace, Jr., 116.

In this latter case Justice Grier expressed his strong repugnance to the allowance of counsel fees, and said that the principle seemed to belong rather to the hall of the Cadi than to the judgment seat of the Court.

The language employed in the bond excludes the idea that attorneys' fees were contemplated.

The significant words of the bond are "costs" and "damages." The word "costs" is used to signify the expenses incurred by the defendant in the attachment proceedings, and the word "damages" is used with reference to the injuries sustained from the levy upon the defendant's property.

That the word "costs" cannot be deemed to include attorneys' fees is conclusively shown by the history of legislation in Florida on that subject, and also by the well understood meaning of the word.

In 1828 the Legislature provided that "in all cases the party recovering judgment shall recover also his legal costs and charges, which shall be included in the judgment." And this provision has remained in force from that day to this and appears as Section 1304 of the Re-

vised Statutes (1892). The words "costs and charges," used in this statute during a period of seventy-five years have uniformly been construed to embrace only taxable costs, and have never been deemed to include attorneys' fees, and at no time have attorneys' fees been allowed by statute to one party against another, except in certain special proceedings brought to enforce statutory liens and recover the value of stock killed by railroads, with the exception of the period between July, 1870, and March, 1873, when what is known as the "Code Practice" was in force. It is evident that the word "costs" is used in the same sense in the attachment bond as in the Act of 1828, and that it refers only to the costs which the defendant may have taxed in his favor in the attachment proceedings. This is the generally accepted meaning of the word.

Anderson's Law Dictionary, 267.

The fees which parties have to pay counsel for asserting their rights have never been considered as costs, chargeable to the party cost.

Melancon vs. Robichand, 19 La., 357.

"The word 'costs,' when used in relation to the expense of legal proceedings, signifies the sum prescribed by law as charges for the services enumerated in the fee bill."

Apperson vs. Mut. Life Ins. Co., 38 N. J. L., 388.

"A colicitor's fee cannot be taxed as *costs* in a case."

22 Ill., 546; 47 Ill., 373.

"The term 'costs' in an agreement in relation thereto, legally signifies only the expenditures which are by law taxable, and included in the judgment, and does not include attorneys' fees." McDonald vs. Page, Wright, (Ohio) 121.

The case of Frost vs. Jordan, 37 Minnesota, 546, was an action on attachment bond to recover attorneys' fees. The bond in that case was conditioned to pay all costs and all damages in case the defendant recovered judgment. The Court denied the recovery of attorneys' fees, and among the reasons assigned for the disallowance was the interpretation put upon the terms of the bond. The Court indicated that the word "costs" was intended to

include merely the taxable costs allowed by statute (which in that State included $10.00 for attorneys' fees), ~~proceedings should be recovered on this bond.~~ The legislature intended to allow anything beyond such taxable costs on account of the expense of the litigation; and that the "damages" referred to in the bond were intended to be limited to those resulting directly from the seizure and detention of the property attached, such as loss of its use, and loss or deterioration resulting from its detention.

It is clear that the word "costs" employed in this bond includes only taxable costs, and it is equally clear that the Legislature never contemplated that any other or further expense of defending against the attachment proceedings should be recovered on this bond. The Legislative mind was directed especially to this subject and, having provided for the payment of taxable costs merely, it cannot reasonably be supposed that any other or additional expense of defending the suit was meant to be embraced in the term "damages."

"'*Expressio unius est exclusio alterius,*' is a universal maxim in the construction of statutes." U. S. vs. Arredondo, 6 Peters, 691. This maxim "is based on the rules of logic and the natural workings of the human mind." Black on Interpretation of Laws, 146.

Assuming the word "damages" to be broad enough to include the expenses of defending the suit, yet must the meaning of that word be controlled and restrained by the word "costs," which has special relation to this subject. Reiche vs. Smythe, 13 Wallace, 162; Sutherland on Stat. Con., Sec. 219.

This presumption is heightened when it is considered that at the time this statute was passed attorneys' fees were not treated as an element of damages for any breach of contract or for the commission of any tort. It is to be presumed that the damages referred to were such as could usually be recovered.

A takes B's chattel and puts him to the expense of bringing an action of trover or detinue. The verdict in the one case would be for the chattel, or its value at the time of verdict, and taxable costs, and in the other the

value of the chattel at the time of the taking, and in neither instance are attorneys' fees recoverable.

Skinner vs. Pinney, 19 Fla., 148.

A promises to pay B $100 and by a breach of his contract puts B to the expense of bringing an action of assumpsit to recover the money unjustly withheld. This action "sounds in damages," which are designed to be full compensation for the wrong done, but the recovery is limited to the principal sum due, interest by way of penalty for the delay, and taxable costs, but no attorneys' fees. So in an action of covenant for a breach of a covenant of title in a deed, no attorneys' fees can be recovered.

Leffingwell vs. Elliott, 10 Pickering, 204.

These rules of the common law existed in Florida at the time of the adoption of this statute and ever since, *and there is even less reason* for allowing attorneys' fees for the recovery of property taken under process of law, than there is for the recovery of property taken by a naked trespasser.

Patton vs. Garrett, 37 Arkansas, 613.

It is to be presumed, therefore, that the Legislature did not intend to impose a more extensive liability upon the surety on a bond than was imposed by the law in the cases referred to. It is true that there are cases where attorneys' fees may be indirectly recovered in actions of trespass, by way of exemplary damages, but no foundation has been laid for the recovery of any such damages in this action, and under no circumstances can exemplary damages be recovered in a suit on the bond.

FLORIDA DECISIONS.

In the case of Wittick vs. O'Neal, 22 Fla., 593, the Supreme Court of Florida held that attorneys' fees could be recovered on an injunction bond, conditioned to repay *all damages* the defendant might sustain. This decision was founded on what the Court was pleased to consider the weight of authority. The Court treated the question as one of general jurisprudence, and while it considered such precedents as were furnished by the decisions from other states, it did not consider the analogies fur-

nished by its own State, namely, the measure of damage in actions for trespass and for the taking and detaining of chattels, or that for breach of contracts to pay money, or to do a specific act. The bond in the case of Wittick vs. O'Neal was conditioned to repay *all damages,* etc., the word *costs* being omitted, which of itself is sufficient to differentiate that case from the case at bar. That case was decided long after the passage of the Act prescribing the condition of an attachment bond, and hence the rule laid down in that case was not in the contemplation of the Legislature when it passed the Act.

It could not be said to have entered into and become a part of the contract sued on in this case, any more than the rule for the assessment of damages in detinue and assumpsit did.

Indeed, at the time these bonds were given there was a Legislative declaration of policy on this subject which was very much more germane than the decision of Wittick vs. O'Neal; that is, the measure of damages upon a replevin bond, as prescribed by statute. The measure of damages in such cases will appear from the following quotations from the statutes:

THE MEASURE OF DAMAGES ON A REPLEVIN BOND.

In Florida a plaintiff in an action of replevin obtains possession of the goods at the inception of the suit by giving bond, "conditioned that the plaintiff will prosecute his suit to effect and without delay, and that, if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay to the defendant all such sums of money as may be recovered against him by such defendant in the said action for any cause whatsoever."

Sec. 1713, page 573, Rev. Stat. Fla.

The defendant in replevin may, at any time within three days after the levy of the writ, have the property restored to his possession by giving bond, "conditioned to have the property forthcoming to abide the result of the suit."

The statute prescribes the nature of the judgment to be recovered by both the plaintiff and defendant in replevin as follows:

Sec. 1724. Judgment for Plaintiff:

1. When goods were not delivered to defendant, if it shall appear upon default of the defendant, or upon trial, or otherwise, that the goods described in the declaration were wrongfully taken * * and said goods shall have been delivered to the defendant by the officer executing the writ, the plaintiff shall have judgment for his damages caused by the taking and detention, and for his costs of suit."

"2. When goods are re-delivered to defendant upon his forthcoming bond, the plaintiff shall take judgment for the property itself, and against the defendant and the sureties on the forthcoming bond of the defendant, *for the value of the property*, such judgment to be satisfied by the recovery of the property, or the amount adjudged against the defendant and his sureties." * *

Section 1725. Judgment for defendant:

"1. When goods have been re-delivered to defendant. When the goods have been re-delivered to the defendant upon his forthcoming bond, and it shall appear, upon the non-suit of the plaintiff, or otherwise, that the defendant is entitled to the goods, he shall have judgment against the plaintiff and the sureties on the bond for his damages for the taking of such property and for his costs."

"2. When goods have not been re-delivered to defendant. When it shall appear, as set forth in the preceding section, and the property shall not have been redelivered to the defendant, judgment shall be entered up against the plaintiff for possession of the property and costs, and against him and his sureties for *the value thereof and costs*, in the same manner as provided in Section 1724, paragraph 2, for judgment in favor of the plaintiff; and the defendant shall have the same election as is in said Section accorded to the plaintiff."

See page 576, Rev. Stat. of Fla.

These provisions were adopted prior to the rendition of the decision of Wittick vs. O'Neal, 22 Fla., 593, but codified into the Revised Statutes afterwards.

An inspection of this statute shows that *taxable costs* are the only expense of carrying on the litigation which is allowed to either party, and this is the rule invariably followed in the application of the statute.

Here is an express declaration of principle or policy against the allowance of attorneys' fees in a case where the property of a defendant may be taken at the inception of the litigation, and where the necessity for employing counsel is equally as great, and it is to be deemed of greater force than the decision in Wittick vs. O'Neal, because it was announced soon after (March 15, 1845) the adoption of the statute prescribing the form of an attachment bond, and reaffirmed in 1892 in a general revision of the laws, along with the original statute prescribing the form of an attachment bond.

A defendant in attachment may release the property upon giving a forthcoming bond, just as in replevin, and forthcoming bonds were actually given in this case.

The case of Gonzales vs. DeFuniak &c. Tobacco Co., 41 Fla., 471, was an action on an attachment bond, and was decided subsequently to June, 1899, or two years after these bonds were executed. The bond had been given for the purpose of suing out an ancillary writ of attachment to an action of assumpsit. It appeared that the action of assumpsit had been dismissed by the voluntary act of the plaintiff, and that the ancillary writ of attachment had thereby been dissolved *ipso facto*. There was evidence to show that money had been expended for the defense of the action of assumpsit, but none to show that any expense had been incurred in the defense of the attachment proceedings. The Court held that the amount expended for the defense of the action of assumpsit could not be recovered on the bond. In that connection the Court said:

"By the great weight of authority, while attorneys' fees and other expenses incurred in relation to the attachment or in procuring its dissolution will be allowed as damages in actions upon attachment bonds, the fees and

expenses incurred in defending the principal suit cannot be allowed, in the absence of statute, or of a stipulation in the bond to that effect.

Text, 477.

The Court then added:

"In disposing of the case upon the points presented, we do not want to be understood as holding that the declaration in this case states a cause of action, for under the decision of Steen vs. Ross, 22 Fla., 480, it is, to say the least, doubtful whether any breach of the attachment bond is alleged."

It appears that the only question before the Court in this case was the liability for attorneys' fees expended in defending the main action, which the Court held could not be recovered, and that the Court was careful to say that it doubted whether the declaration stated a cause of action at all.

What was said, therefore, on the subject of attorneys' fees expended in defending the attachment proceedings proper was in no wise necessary to the disposition of the question before the Court, and was the merest dictum.

This decision would not be binding, even on the Supreme Court of Florida, and certainly is not binding on the Federal courts.

Carroll vs. Carroll, 16 Howard, 275 Text 286, 287.

Murray, &c. vs. Chicago & N. W. Ry. Co., 92 Fed. Rep., Text 870.

By Section 1327 of the Revised Statutes of Florida, the judge who writes an opinion is required to prepare "a syllabus or statement of the points or principles intended to be decided by the Court," and in the case under consideration, it is stated in the syllabi that "attorneys' fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in actions upon attachment bonds."

The opinion expressed on the subject is none the less a dictum for all that, for in Hart, et al., vs. Stribling, 25 Fla., 435, the Court says:

"Where the judge who writes the opinion of the Court expresses a view upon any point or principle which he is not required to decide, his opinion as to such point is an arbiter dictum and is binding upon no one."

Neither in the case of Wittick vs. O'Neal nor in that of Gonzales vs. Tobacco Co. does the Supreme Court of Florida treat this question as one of statutory construction, or of local law, but as one of general jurisprudence, to be determined according to principles of common law relating to the subject of damages. And it is to be noted that in the last mentioned case the Court gives no attention to the language of the bond prescribed by the statute, or to the analogies of the law in force at the time the statute was adopted. Consequently neither case presents an instance of statutory construction, and this court is not bound by them.

In the case of Venice vs. Murdock, 92 U. S., 501, this Court said:

"It is argued, however, that the New York decisions are judicial constructions of a statute of that State, and that, therefore, they would furnish a rule by which we must be guided. The argument would have force if the decisions in fact presented a clear case of statutory construction, but they do not. They are not attempts at interpretation. They would apply as well to the execution of powers or authorities granted by private persons as they do to the issue of bonds under the statute. They assert general principles, etc."

In construing statutes the Federal courts are not required to adopt a construction based on the implications of a judicial opinion.

Caesar vs. Capel, 83 Fed. Rep., 403.

"A decision by a state court that every right of action given by a statute is in the nature of a specialty, is not, when applied to a particular statute of that state, a construction of that statute which a Federal court is bound to follow, but is a ruling upon the question of general law."

Terminal Co. vs. National Bank, 83 Fed. Rep., 607, Text 611.

SUMMING UP.

First. This is a contract given in pursuance of statute. The statute is silent as to the elements of damages recoverable, and these have been left to be determined according to the principles of the common law.

Both the Florida cases referred to treat the subject of the measure of damages on the particular contracts referred to as one of general jurisprudence.

"This Court determines for itself the construction of a contract, without reference to the previous adjudications of he State courts on the subject."

Pana vs. Bowler, 107 U. S., 529.

This Court should determine this question according to its own notions of the law.

Railway Co. vs. Prentice, 147 U. S., 106.

According to all the federal decisions, and all the analogies of the law existing when the form of this bond was adopted, attorneys' fees cannot be recovered thereon, and according to the statutory declaration of policy expressed in reference to the measure of damages on a replevin bond, these fees cannot be recovered.

Second. This is not a question of local law. This question does not relate to the procedure of the Court in which the bond was given, since no judgment could have been given on the bond in the attachment proceedings, and an action might have been maintained thereon in any country where the law of nations prevails, and where service could have been obtained. The subject matter of the bond is not a thing that has a fixed and local character, it is damages; and the judgment on such a bond is a money judgment.

"The judiciary act declaring local law rules of decision in Federal courts is limited in its application to laws strictly local, to the positive statutes of a state, and the construction thereof adopted by local tribunals and to rights and titles to things having a permanent locality, and does not extend to contracts and other instruments of a commercial character."

Swift vs. Tyson, 16 Peters, Text, 18, 19.

"The decisions of courts do not constitute laws within the meaning of the 34th Section of the Judiciary Act, they are at most only evidence of what the laws are, and are not themselves laws."

I. D., 18.

"This Court does not follow the State courts in their construction of a will or any other instrument, as they do in the construction of statutes."

Lane vs. Vick, 3 Howard, 476; approved in Barber vs. Pittsburg &c. Railway Co., 166 U. S., 100.

The fact that the contract or bond was given in pursuance of statute can make no difference.

Blackburn vs. Portland Gold Min. Co., 175 U. S., 571.

Fla. C. & P. R. R. Co. vs. Bell, 176 U. S., 321.

DeLarmar's Nevada Gold Min. Co. vs. Nesbitt, 177 U. S., 523.

Provident Sav. L. Assur. Soc. vs. Ford, 114 U. S., 635.

The adoption of such a criterion would result in the abdication of the right of independent judgment in much the greater class of cases in which the Federal courts exercise jurisdiction. Since all manner of instruments, including deeds, wills and negotiable instruments are dependent as to their legal existence and form upon statutes.

Second. Assuming the question to be one of local law, yet it is the duty of the Court to exercise an independent judgment, because of the fact that the Florida Court had not, prior to the execution of these bonds, passed upon the right to recover attorneys' fees as damages on an attachment bond.

"When contracts and transactions have been entered into under and rights have accrued thereon under a particular state of the decisions, or *where there has been no decision of the State tribunals,* Federal courts properly *claim the right to adopt their own interpretation of the law applicable to the case, although a differ-*

ent interpretation may be adopted by the State courts after such rights have accrued."

Burgess vs. Seligman, 107 U. S. Text, 33, 34.
Pleasant Tp. vs. Ins. Co., 138 U. S. 67, Text 72.
Hotel Co. vs. Jones, 116 Fed. Rep., Text 798, (6th Circuit).

As already pointed out, Wittick vs. O'Neal, 22 Fla., 593, did not amount to a determination of this question.

The rule announced in that case was no more applicable than the rule prevailing in detinue, trover or assumpsit, and *not so applicable as the rule declared by statute in relation to the measure of damages on a replevin bond.*

Gonzales vs. DeFuniak Havana Tobacco Co., 41 Fla., 471, was decided subsequently to June, 1899, and after the Circuit Court had passed on this question adversely to the Bucki Company by striking the allegations relative to attorneys' fees from the declaration (Rec., 161). (The allegations were afterwards restored to facilitate the presentation of the question to the Appellate Court.)

And, moreover, as already shown, what was said on the subject of attorneys' fees in that case was a dictum.

Third. Almost immediately after these attachments were sued out, the Bucki Company removed the attachment suits into the Federal courts, and upon the dissolution of the writs, that company became entitled to have taxed in its favor the attorneys' fees allowed by Act of Congress.

Upon the dissolution of the writ for $75,000, costs to the amount of $415.00 were taxed for the Bucki Company, and included in that amount was the usual docket fee for the attorney.

Assuming the question to be one relating to the practice of courts, the removal of the attachment suits in the Federal court brought the subject within the purview of the Federal statute, and only such fees as are thereby allowed may be recovered.

Flanders vs. Tweed, 15 Wallace, Text 452.
U. S. vs. Treadwell, 15 Fed. Rep., 532.

4. Aside from the merits of the general proposition already discussed, there are peculiar reasons in this case why the plaintiff should not be allowed counsel fees for securing the release of the property attached, as follows:

(a) The personal property was released from the attachment from forthcoming bonds and the sum of seven hundred and fifty dollars ($750.00), representing the cost of giving the bond for one hundred thousand dollars ($100,000.00), was recovered from this defendant in this suit, and the plaintiff was not put to any expense for giving the other forthcoming bond (Rec.,183).

(b) There were two common law actions, one in which $15,000 damages were claimed, and in which an attachment for $9,980.00 was issued, and another for $200,000 damages, for which an attachment for $75,000 was issued. The smaller attachment was dissolved on November 1, 1897, for errors appearing upon the face of the paper. Thereafter, on the application of the Bucki Company, the two common law actions were consolidated, and pleadings were filed as to the debt or sum demanded, which, under the Florida practice, were applicable to the attachment proceedings as well as to the common law action to which they were ancillary.

Weston vs. Jones, 41 Fla., 241.

Prior to the 20th of January, 1898, the pleadings had been fully made up (Rec., 114, at top), and the common law action could have been tried at the same time as the motion to dissolve the attachment for $75,000, and upon the same pleadings.

Weston vs. Jones, 41 Fla., 241.

At this stage of the proceedings, the Bucki Company moved the Court for a separate trial of the motion to dissolve the attachment upon the pleadings as they stood, and for the postponement of the trial of the common law action to the Spring term (Rec., 114). The Court granted this motion and directed separate trials to be had (Rec., 114). The motion to dissolve the attachment was tried on the formal pleadings (Rec., 114), and the attachment was dissolved upon the ground that the Atlantic Lumber Company was itself, on October 1, 1897, in default in respect to the performance of the written contract, and

could not on that day maintain a suit against the Bucki Company for prospective profits on account of the breach thereof (Rec.,114).

It is an established fact that had the common law action or suit on the merits been tried at the same time as this motion to dissolve the attachment, judgment would have resulted for the Bucki Company on that cause on those counts to which the attachment of $75,000 was applicable (Rec., 114), and it might have been so tried under the Florida practice.

Weston vs. Jones, 41 Fla., 241.

While the Court in form postponed the trial of the common law action, it was in point of fact when he tried this motion to dissolve the attachment upon the formal pleadings, trying the same issues that were involved in those counts of the common law action to which the attachment was applicable; and the ground upon which he dissolved the attachment was necessarily an adjudication that the Atlantic Lumber Company could not maintain an action of any kind upon the cause of action set up in those particular counts. The Atlantic Lumber Company subsequently recognized this situation at the trial of the common law action, by merely offering to prove what it had proved at the trial of the motion to dissolve the attachment, and the Court, presumably on the ground that it had already adjudicated the question on the merits, ordered judgment for the Bucki Company on those particular counts (Rec., 133).

The result was that the services of the attorneys who represented the Bucki Company in connection with this motion to dissolve the attachment, secured an adjudication, which not merely defeated the attachment, but also the common law action to which the attachment was ancillary, and if it should be permitted to recover the fees of counsel, it would be in a better position, in so far as counsel fees were concerned, than it would have been had no attachment been issued. According to those authorities which recognize the right to recover counsel fees on attachment bonds, all the services rendered in defense of the attachment proceedings must have been ca-

pable of separation from those which would have been incurred in the defense of an action in any event.

1 Sedgwick on Damages, Sec., 237.

Moreover, the Bucki Company having demanded a separate trial of the motion to dissolve the attachment, when the matter could have been disposed of in connection with the trial of the common law action, it is estopped to demand that the Atlantic Lumber Company should pay counsel fees for conducting the trial in addition to the other costs of suit. If a party either wantonly or for the purpose of furthering its own interests, unnecessarily imposes costs and trouble for twice trying the same issue, it should not receive award for such conduct. It is reasonable to presume that the Bucki Company asked for a separate trial in order to lay a basis for the claim of counsel fees.

II.

SECOND, THIRD, FOURTH, FIFTH AND SIXTH SPECIFICATIONS OF ERROR.

All of these specifications relate, in effect, to the right to recover profits lost on account of injury to credit.

The Court permitted the plaintiff to prove the profits it had been making out of its business prior to October 1, 1897 (Second Specification).

It instructed the jury that *it was a question of fact for them to determine whether the plaintiff would have been financially able to continue in business had these attachments not been levied, and if they should find it could have done so, "to award such damages as they felt convinced the plaintiff had sustained"* (Third Specification).

The Court told the jury, too, that they were "the exclusive judges of the effect of the writs of attachment upon the business of the plaintiff" (Fourth Specification).

Also that they "were the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequences of the issuing of the attachments," and that one of these consequences was all damages caused by the interruption of plaintiff's business,

either by disabling plaintiff to operate its mill, or by disabling plaintiff to deliver timber and lumber it had agreed to deliver (Fifth Specification).

The Court likewise instructed the jury that it was their "province and right to decide, from the evidence, whether the writs of attachment prevented the performance of any contract with Shepard, Morse & Co. for the loan of money or delivery of lumber, and the damages sustained by the plaintiff for such non-delivery" (Sixth Specification).

The Court likewise refused to instruct the jury at defendant's request, that they should allow plaintiff no damages on account of its inability to fill orders, if such inability was due to the fact that plaintiff was unable *to buy the logs* from which to cut the lumber (Seventh Specification, Rec., 193).

And in another place the Court instructed the jury that it was their "*province and duty to determine the length of time the attachments* remained operative on the property attached" (Seventeenth Specification, Rec., 203).

It was established by the evidence that the mill was never taken out of plaintiff's possession (Rec., 186).

That the logs and lumber sustained no injury while in the sheriff's possession, and that they were shortly after seizure redelivered to plaintiff (Rec., 186). Also that the lumber was sold by plaintiff and applied on its orders as far as it would go (Rec., 187). There was no evidence to show that it sold for any less than it would have sold for had no attachments been levied (Rec., 187); that the market price of lumber advanced after October 1, 1897 (Rec., 187); and that the parties with whom plaintiff had contracted to sell lumber stood ready to accept it long after November 16, 1897, the date upon which the mill finally closed down (Rec., 192, 20th exception).

It is stated in the bill of exceptions that these facts are *established*, and indeed they are not disputed.

Consequently the plaintiff lost no profits on the logs and lumber seized, or suffered any damage on account of the deterioration of this property. Its business did

not suffer on account of the seizure of the mill, because that was not taken out of its possession.

To what cause then did these charges refer, as the source of the loss of profits, since no loss was sustained on the stock on hand, and the possession of the mill plant was not interfered with? The answer made is, "The plaintiff's credit was injured by the attachment, and as the result of this injury to credit, plaintiff was unable to put itself in a position to supply its mill with logs, so as to continue in business."

The Bucki Company's position is this: Had these attachments not been levied we might have borrowed the money necessary to go into the logging business, as an auxiliary to our mill business, and we might have made profits under those new conditions. This, then, was the wide field of speculation upon which the jury was directed by these charges to enter.

Prior to October 1, 1897, the plaintiff had a constant and regular supply of logs at the rate of 2,000,000 feet per month, and at a fixed price, but on that day this contract was cancelled, and the log supply cut off. The mill was operated until all the logs on hand on October 1 were used up, and on November 16, 1897, it closed down for want of logs to saw. It appeared, from the testimony introduced by the Bucki Company, that it would have been necessary to make an investment of from $150,000 to $250,000 in order to supply the mill with logs (Rec., 87). Notwithstanding this, the Court refused to strike out the testimony relative to the profits made prior to October 1, 1897, profits which were made under entirely different conditions from what would have confronted plaintiff in the future, and the jury was permitted to consider that evidence as a basis for estimating what the plaintiff might have made in the future, when undertaking to supply itself with logs.

And, notwithstanding the plaintiff was shown to have no credit on October 1, 1897, and notwithstanding that the Atlantic Lumber Company on that day commenced two common law actions against it, claiming damages to the amount of $200,000, the jury was directed to consider the effect of these attachments on plaintiff's

credit, to separate the effect of the actions at law on that credit from that of the attachments, and to speculate whether plaintiff would have been *financially* able to continue in business and to make a profit, if these attachments had not been issued.

It is true that the Trial Judge told the jury that he had struck out the evidence relative to what the Bucki Company might have made in future by continuing in business (Rec., 192), but that testimony had been heard by the jury and these instructions directed them to assess damages for injury to business, and left them to determine for themselves the length of time the liens continued on the property. Under these circumstances the general charge of the Court was a vain act, and by giving these charges he nullified his action in striking out certain testimony.

And the Trial Judge refused, at defendant's request, to charge the jury that the Bucki Company could recover no damages on account of its inability to purchase the logs from which to cut orders for lumber (Seventh Specification, Rec., 175).

There are two reasons why the Court should have excluded from the consideration of the jury the question of injury to business and loss of profits through injury to credit:

First. Because no *facts* were proved which tended to show that the Bucki Company would have been able to borrow the funds necessary to carry on its business had these attachments not been levied, as their ability to do so was, under the evidence, a matter of mere speculation or conjecture, and because such damages were too remote.

Second. Because there were no facts proved which would have enabled the jury to determine with any degree of certainty that profits could have been earned, even though the necessary funds to carry on the business had been procured.

These propositions will be discussed in their order.

FIRST PROPOSITION.

H. W. Simmons was the financial manager of the Bucki Company. He testified that its credit was bad in August and very bad in September. That on October 1, 1897, it was necessary for the company to have had a loan of $25,000 in order to have gone on in business at all, and that it must have had a loan of $50,000 in order to have gone on successfully (Rec., 188). And it must be borne in mind that this estimate was on the assumption of the continuance of the delivery of logs by the Atlantic Lumber Company under the contract between it and the Bucki Company.

After the rescission of that contract it would have been necessary for them to have made an additional investment of $150,000 to $250,000 in order to supply the mill with logs, as shown by their own testimony (Rec., 87).

There was no evidence showing, or tending to show, that in case the attachments had not been levied, the Bucki Company could have obtained the money necessary to put itself in a position to supply the mill with logs—and indeed the testimony almost conclusively established that it could not have done so. There was testimony to the effect that there were negotiations pending between Shepard, Morse & Co. and the Bucki Company for a loan of $25,000 from Shepard, Morse & Co., to be secured by a mortgage on the mill and the first-class boards then in the yard, the loan to be paid by the shipment of the boards. This was no more than a sale of the boards, the purchase money being paid in advance. And the boards were sold after the attachment for as much or more than Shepard, Morse & Co. had agreed to pay (Rec., 187), so that no disadvantage was sustained from the loss of that loan. This amount, if it had been obtained, would have been entirely inadequate.

It would have been impossible for a jury to determine with certainty that the necessary funds could have been obtained had no levy been made, and it would have been a matter of pure conjecture. It would have depended upon whether a person having money to lend could be found, the faith of a possible money lender in the Bucki

Company's ability to pay, and in the adequacy of the security offered. All of this was so much a matter of uncertainty, and of individual taste on the part of the lender of money, that no one could have said what the result would have been.

"Loss of credit or custom generally involves the intervention of the will of strangers, and it is therefore generally remote. Thus, in a case of wrongful attachment, no compensation is allowed for loss of credit."

1 Sedgwick on Damages, Sec. 127.

In Elder vs. Kutner, 97 California, 490, 32 Pac. Rep., 563, it is said:

'The liability of defendant arises under their contracts, and is limited to its terms and conditions. By that contract they did not undertake to become liable for the remote and possible consequences which in some contingency might follow, but for the proximate consequences, naturally and ordinarily resulting from the effect of the writ. The impairment of plaintiff's credit, the inability to sell lands levied on, or to contract a loan upon the security of such land was not a proximate, but a remote, consequence of the attachment."

In Union Nat. Bank vs. Cross, 100 Wis., 174, an attachment was levied on a sawmill plant and the business stopped. The Court held:

1. That in such a case there could be no recovery for injuries to credit, reputation or business, as such damages were too remote and speculative.

2. That in case of a wrongful levy upon a stock of goods kept for sale, which were afterwards returned to the owner, he may recover as part of the damages any depreciation in the value of his goods during the time they were held, the reason being that the goods are kept for the purpose of sale, and had they not been seized, they might have been sold for their value when seized; hence the depreciation in value may be said to be a reasonable and certain element of damages. But when property kept for use and not for sale is attached, the reason no longer holds good, because there is no presumption that the property could or would have been sold, but the presumption is to the contrary, and that the

proper measure of damages in such a case was the value of the use of the mill, its rental value, while held in the possession of the officer, and any injury, wear and tear or negligent care while in the officer's possession. The measure of damages to sawmill property and fixtures by reason of wrongful attachment, is the loss of its use or rental value, and not the injury to business, credit and reputation resulting from bankruptcy caused by the attachment.

"It is the general rule that the depreciation to real property upon which an attachment has been levied, which occurs while the levy remains in force, if there be no change of possession, is not the immediate result of the attachment, and recovery therefor cannot be had of the attaching creditor."

Reasdale vs. Major, 106 Iowa, 1.
See also Marx vs. Strauss et al., 93 Ala., 453.
Shinn on Attachments, page 694.
Gerard vs. Moore, 24 S. W. Rep., 652.

SECOND PROPOSITION.

The Bucki Company's position is: "Had we possessed sufficient credit, we could have borrowed the money necessary to continue in business, and had we continued in business, we could have earned a profit out of our business." A possibility upon a possibility. Let it be supposed that the evidence was sufficiently definite to have enabled a jury to find that the necessary money could have been borrowed, for the purpose of inquiring whether there was such evidence of the ability of the Bucki Company to earn profits, as would have justified the submission of this question to a jury, ~~then it can be demonstrated that the Bucki Company could not have earned such profits.~~

Prior to October 1, 1897, the Bucki Company had a steady supply of logs of a definite quality and quantity, and at a fixed price. Subsequently it could not have supplied its mill with logs without going into the logging business on its own account. The result of its business as a whole would have, of course, depended upon the success of this auxiliary business, and its success in that was

dependent on a great variety of circumstances, such as cost of logging plant and equipment, cost of timber lands, quality of timber, the management of the logging business, the seasonableness of the weather, logging business being a business carried on in the open air, and a variety of circumstances too uncertain to be calculated upon, and no facts were shown in the testimony which tended in the least to remove the uncertainty.

In the case of Cushing vs. Seymour, 30 Minnesota, 301, the Court distinguished the previous decision of Goebel vs. Hough, 26 Minn., 252, and held that damages growing out of the loss of the use of a threshing machine were too remote to be recovered. The Court said: "Threshing is conducted in the open air, and subject to contingencies of weather, breakages, delays, condition and quality of grain and state of roads, skill and energy in operating the machine, which make it impracticable definitely to ascertain what the profits of performing particular threshing contracts will be, in the absence of actual experiment in the particular instance."

This decision applies with peculiar aptness to this case, and tends to illustrate it. But leaving out of view the difficulties of the logging business, what certainty was there that the lumber manufactured at the mill could be disposed of, and if disposed of, that it could be disposed of at profitable prices? The Bucki Company offered in evidence a contract with the Yellow Pine Company, by which it bound itself to take a large part of the lumber manufactured by the Bucki Company during the year of 1897 (Rec., 182).

But it will not be contended that the Bucki Company during 1897 could have put itself in a position to place lumber on the market, gotten out with its own equipment and from its own forests. There was no testimony showing how long it would have taken the Bucki Company to procure timber lands, secure necessary logging equipment, and organize the business, so as to place itself in a position to get out logs. Charles L. Bucki admitted that it would have taken sixty days at least to have prepared and organized a force and equipment alone (Rec., 82), so it is apparent that, even though the Bucki

Company had set about preparing to supply itself with logs immediately after October 1, 1897, it could not have commenced to put in logs prior to January 1, 1898, and afer that date it would have had to seek customers, and it might or might not have found them. The experience of Stockton, who leased the mill from February 22, 1898, to February 22, 1899, and who operated it at a loss of $18,000, illustrates the uncertainty of the situation (Rec., 105).

The following long list of authorities deny the right to recover for injury to business:

The case of Bates vs. Clark, 95 U. S., 204, was an action of trespass against an army officer for the illegal seizure of a lot of whiskey, part of plaintiff's stock in trade, the plaintiff being at the time engaged in a general mercantile business, and in that case the Court held that the measure of damages was the difference between the value of the goods so seized at the time and place where they were taken, and at the time and place where returned to the plaintiff. Text 210.

In Coulson vs. Bank, 54 Fed. Rep., Text 859, which was also an action of trespass for the illegal seizure of personal property, this Court said:

"The measure of damages for the unlawful seizure, without malice, of personal property, where the property is subsequently returned to the owner, is the difference between the value of the goods at the time and place of the unlawful taking and at the time and place when returned, in addition to the value of the use during the time of detention."

The case of Watson vs. Sutherland, 5 Wallace 74, was a suit in equity to restrain the threatened illegal levy of a writ of attachment upon the complainant's stock in trade, and the Court granted the relief on the ground that an action of trespass against the marshal or the attaching creditors would be an inadequate remedy. The bill, it is to be observed, alleged that the complainant had established a profitable trade. The Court used this emphatic and unqualified language in its opinion:

"If the appellants made the levy, and prosecuted it in good faith, wihtout circumstances of aggravation, it is well settled that the measure of damages, if the property were not sold, could not extend beyond the injury done to it, or if sold, to the value of it when taken, with interest from the time of taking down to the trial. And this is an equal rule, whether the suit is against the marshal or the attaching creditors, if the proceedings are fairly conducted, and there has been no abuse of authority. Any harsher rule would interfere to prevent the assertion of rights honestly entertained, and which should be judicially investigated and settled. Legal compensation refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. Loss of trade, destruction of credit and failure of business prospects are collateral or consequential damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law."

In North vs. Peters 138 U. S., 271, the Supreme Court granted similar relief on the same ground.

The case of Watson vs. Sutherland, *supra*, is quoted with approval by the Supreme Court in the recent case of Vance vs. Vandercock Co., 170 U. S., Text 480.

The case of Bing Gee vs. Ah Jim, 7 Fed. Rep., 811, is the only Federal authority which I have found where damages to credit were claimed in an action on an attachment bond. In that case the complaint alleged that the plaintiff's property, consisting of five houses and a store, in which plaintiff was engaged in doing business as a merchant, were attached under the writ of attachment, whereby plaintiff was put to great expense, and his credit as a merchant injured, etc. On motion, the Court struck out the allegations in regard to injury to credit. Text 812.

Probably the leading case bearing on this subject is that of Howard vs. Stillwell & Bierce Mfg. Co., 139 U. S., 203, in which it was held that loss of profits for breach of a contract could not be recovered, because not in the contemplation of the parties, and because too remote, conjectural and uncertain.

This case will be referred to again in connection with the testimony which the Bucki Company offered for the purpose of establishing the amount of its damages.

The text books are unanimous in holding that damages to business and loss of profits cannot be recovered in a suit on an attachment bond.

1 Sedgwick on Damages (8th ed.), Sec. 127.
1 Sutherland on Damages (2d ed.), Sec. 55.
2 Id. (2d ed.), Sec. 515.
Drake on Attachment, Secs. 175, 179, b.
1 Shinn on Attachment, p. 342.
Wade on Attachment, Secs. 300, 301.
2 Sedgwick on Damages (8th ed.), Secs. 682, 436.

The decisions of the State courts are almost unanimous in holding that damages to credit and business, and loss of profits cannot be recovered as the following citations will show:

The case of Thompson vs. Webber, 4 Dakota, 240, was an action upon an attachment bond, to recover damages for an attachment improvidently sued out against the plaintiff's property, and damages for injury to business and credit were sought to be recovered therein against the obligors upon the bond. And this case is worthy of especial note as the doctrine of Watson vs. Sutherland was applied. The lower Court admitted evidence in regard to the effect of the attachment upon the business of the plaintiff, which the Supreme Court held to have been error, and in that connection it said

"This is an action brought against the defendants upon an undertaking express in its terms, by which the obligors undertake to pay to the plaintiffs all costs that may be awarded to them, and *all damages that they may sustain by reason of the attachment.* As to the sureties, at least the undertaking must receive a strict construction. They cannot be held beyond the letter of the contract. They have contracted to pay these plaintiffs 'all damages that they may sustain by reason of the attachment.' The words themselves are broad enough to include every conceivable damage that might accrue to plaintiffs by reason of the attachment, but they must

have a reasonable construction. We need not, however, examine the decisions of the Courts for a construction of this language. Our Code, following the common law as to the damages flowing from the breach of such an obligation, has set at rest any argument that might be made to the contrary; and say Secs. 1947, 1948, Civil Code (old ed.), page 456:

"For the breach of an obligation arising from the contract, the measure of damages, except when otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.

"No damages can be recovered from a breach of contract, which are not clearly ascertainable, both in their nature and origin.

"Under the terms of this undertaking the plaintiffs were entitled to such damages as would compensate them for the detriment proximately caused by the attachment, or such as would naturally result therefrom. Would the breaking up and ruin of one's business be the proximate and natural result of attaching property? It is safe to say that no well considered case has so held. On the other hand, the decisions and text writers lay down the contrary rule."

In a well considered case in the Supreme Court of the United States, Watson vs. Sutherland, 5 Wallace, 74, in which that Court sustains an injunction against an officer, restraining him from closing up the place of business of the plaintiff, on the ground that an action at law would be inadequate to compensate for loss of credit and the breaking up of his business, Judge Davis, in delivering the opinion of the Court, says: (Quoting the opinion given above.)

The case of Herd vs. Barnhart, 53 Cal., 97, was that of an action upon an attachment bond to recover damages for the illegal seizure of the defendant's wagons, horses, cows and other personal property, and it was alleged that the defendant in the attachment suit was at the time of such seizure engaged in the dairy and farming business with this property, and that the business

was interrupted and prevented by the seizure of such property in question. The Court below gave the following instruction:

"What the use of the property was worth to him during the time he was deprived of it by the writ of attachment is the measure of damage, and in ascertaining the value of such use, you will take into consideration the use he had for the property so attached, and how he could and would have used it, if it had not been taken from him."

The Supreme Court reversed the judgment of the Court below, on account of this charge, and in passing upon the question, said:

"The Court charged that the measure of damage was what the use of the property was worth to the plaintiff during the time he was deprived of it, and that in ascertaining the value, the jury should consider how the plaintiff could and would have used the property, had it not been taken from it. This was substituting a speculative and a peculiar measure of damages for the true rule, which, as applied to the case, was what the use of such property could have been procured for—in other words, the market value—and was erroneous."

I have not had an opportunity to examine the statutes of Alabama and Tennessee, but it appears from Mr. Sedgwick that an exceptional rule exists in those states by force of statutes, in those cases where an attachment is maliciously sued out. Thus, at Section 683, this author says:

"Under the Alabama and Tennessee statutes, if the wrongful attachment be malicious, injuries to credit and business and exemplary damages may be recovered in an action on the bond. The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for the wrongful or vexatious suing out of the writ."

To the same effect see the opinion of Judge Hammond, in Jarman vs. Stewart, 12 Fed. Rep., 268, where the statutes of Alabama and Tennessee are compared.

In Traweek vs. Martin Brown Company, 79 Texas, 460, the Court says:

"As we understand it, it is not for the mere issuance of the attachment that damages in the case are given. When the facts do not exist which warrant the writ, and the property of the defendant is seized, all loss directly and proximately resulting to him from the seizure of the defendant's property is recoverable as actual damages. Such damages are confined to the depreciation or loss to the owner of the goods seized, and to the loss resulting from the sacrifice at a forced sale. This was the rule laid down in Wallace vs. Finberg, 46 Texas, 35, and has ever since been rigidly adhered to in this court. A levy upon real estate, under our statutes, not being attended with any disturbance of the possession, use or enjoyment of the premises by the owner, it follows that as a general rule such a levy can afford no ground for the recovery of actual damages. Counsel for appellant, who have filed an elaborate brief and argument, have cited no case in which such a recovery has been allowed. In two jurisdictions the contrary has been held. Heathe vs. Lent, 1 Cal. 410; Brandon vs. Allen, 28 La. Ann., 60."

The Court then intimated that if it could have been shown that an advantageous sale had been prevented by the attachment, and the property had subsequently depreciated, a recovery of damages might have been sustained.

In Kirbs vs. Privone, 78 Texas, 353, the Court held that loss of business was not an element of actual damages for improper attachment, and could only be recovered where exemplary damages were permissible.

Railway Co. vs. Joachim, 58 Texas, 457.

In Wallace vs. Finberg, 46 Texas, 35, it was held that damages to credit were not recoverable.

In Seattle Grocery Co. vs. Haley, 6 Washington, 302, the Court held that damages for injury to credit could only be recovered as exemplary damages, and not as actual damages on an attachment bond. In this case the Court comments upon Meachem vs. Kennedy, 18 Fed. Rep., 312, which follows Donnell vs. Jones, 13 Ala., 490, Meyer vs. Fagan (Nebraska), 31 N. W., 753, and MacVeagh vs. Bailey, 29 Ill., App., 606, as the only authorities to the contrary, and remarks that the only thing

before the Court in the last two cases mentioned was whether the damages assessed were excessive, and that there was no discussion of the subject of damage to credit in either case.

In Crymble vs. Mulvaney, 21 Colo., 203, damages were claimed for injury to credit and loss of profits growing out of the attachment of the stock in trade of an established business, it being alleged that the plaintiffs were at the time of the attachment in good credit and doing a prosperous business, and the Court held as follows:

"We think, therefore, that the sale was valid, and that the appellee, upon the testimony, was entitled to recover the actual value of the goods taken and retained, together with interest thereon, and damages for the depreciation and loss of those taken and returned, and perhaps for the loss of trade and business during the time the sheriff held possession of the building and excluded him therefrom—such loss being the natural and proximate result of that act—if competent and satisfactory proof of such loss can be made. Yet, we are clearly of the opinion that the Court below erred in submitting to the jury the question of loss of profits thereafter, and of injury to the credit of the appellee, also in submitting to them the question of exemplary damages. The loss of profits resulting from an injury to business after its resumption, and until the commencement of the action and loss of credit, are too speculative, and not allowable under the clear weight of authority."

Loss of future profits caused by seizure of the stock of a grocery store are too uncertain to be recovered.

Casper vs. Kleppen, 61 Minn., 353.

In Anderson vs. Sloan, 72 Wis., 222, in which the declaration alleged that at the time of the attachment the defendant therein was solvent and possessed a large and valuable stock of goods and a good credit, and was making a large profit, and that by reason thereof the business was broken up and ruined, etc., the Supreme Court, in reversing the lower Court, which had charged the jury to allow damages for loss of profits, said:

"If under any circumstances the jury might consider, in assessing damages, that the business and trade of the plaintiff had been injured and interrrupted by the acts of the defendants, we cannot see upon what grounds they are to be chargeable with the supposed loss of profits the plaintiff would have made after the goods had been returned to him, or how, in estimating such loss of profits, they were authorized to estimate the losses occurring within about two years after the goods had been returned to the plaintiff. Damages which are so uncertain and indefinite, and which depend mainly upon the acts of the plaintiff himself, after the defendants have ceased to have any control over his property or his acts, are of too vague and indefinite a character to be estimated by the jury."

In Brownsdorf vs. Fellner, 76 Wisconsin, 45, the Court said:

"In his instructions upon the question of damages, the learned Circuit Judge among other things instructed the jury that they might assess as damages any profits the defendant might have made upon his contracts for the sale of lumber then unfulfilled, if he was prevented from filling such contracts by reason of the attachment, and these instructions were duly excepted to by the plaintiff. It seems to us that these instructions were clearly in violation of the rule as to damages laid down in Anderson vs. Sloan, and were erroneous. The justice of the rule, as stated in that case, is illustrated by the verdict in this. Here the evidence clearly shows that the defendant was not only in embarassed circumstances when the attachment was served, but it appears that he was in fact insolvent, unable to pay his debts, and had in fact transferred nearly all, if not all, of his attachable property to a part of his creditors, either in payment of, or as security for, his debts. It also appears that he did not have on hand or under his control the means of fulfilling his contracts then made for the delivery of lumber, or that he was in a position to perform such contracts had no attachments been made. The damages which the defendant might have suffered by reason of this attachment, in not being able to fulfill his contracts,

are too uncertain, and too much a matter of mere conjecture and guess to be made the basis of the verdict of a jury. The rule laid down in Anderson vs. Sloan is in our opinion most salutary, and should be especially applied in a case like that of the kind at bar, when the evidence tends strongly to show that the defendant's business was so precarious, and his pecuniary embarassment was such before the attachment was levied, as to render it extremely doubtful whether he could have made any profits from his business, even though the plaintiff had not attached."

In a suit on an attachment bond, injury caused to the reputation of the goods attached, and to the reputation of the credit of their owner are ordinarily too remote and speculative to constitute proper elements of legal damage.

Oberne vs. Gaylord, 13 Ill. App., 30 (13 Bradw.).

Defendant in attachment cannot recover on the attachment bond for injuries to his credit, sensibilities or business; the proper remedy for such injuries being in case.

Petit vs. Mercer, 47 Kentucky (8 B. Monroe), 51.

Raider vs. Berger, id., 160.

Under the general rule that one cannot recover for remote and speculative damages, one cannot recover in an action for wrongful attachment for injury to credit.

Seattle Crockery Co. vs. Haley, 6 Washington, 302.

Damages for injury to credit and for loss of prospective profits in business are not recoverable on an attachment bond.

Holliday vs. Cohen, 34 Ark., 707.

It was held in Campbell vs. Chamberlain, 10 Iowa, 337, that in an action on an attachment bond for wrongful attachment, damages for injury to character, credit or business are too remote, and cannot be recovered. In this case the Court said:

"In such actions, the plaintiff is entitled to recover his damages of losses and expenses incurred by him in making defense to the attachment proceedings, and such

FLORIDA DECISIONS RELATIVE TO THE RECOVERY OF SPECULATIVE AND CONJECTURAL PROFITS.

"Profits that are speculative or conjectural are not generally regarded as elements in fixing damages, not because there is anything in their nature, *per se*, which demands their rejection, but because they cannot be estimated with reasonable certainty."

Hodges *v.* Fries, 34 Fla., 64, 71.

That was an action for breach of contract, and in the case of Chipley *v.* Atkinson the supreme court of Florida applied the same rule in an action of trespass on the case.

See Chipley *v.* Atkinson, 23 Fla., 206; text, 222.

losses as he may have sustained by being deprived of the use of the property attached, and any injury thereto by its loss or depreciation in value; for such losses he should be liberally rewarded. If the attachment were sued out wrongfully, then damages should be for such losses and trouble, not only compensatory but exemplary, but injury to credit or character or business are too remote and speculative to be considered in an action of this kind."

In the case of Lowenstein vs. Monroe, 55 Iowa, 82, the Supreme Court of Iowa reaffirmed the doctrine of Campbell vs. Chamberlain, and in that connection said:

"Counsel for appellee have cited to us a number of cases where it has been held that injuries to credit, loss of profits and the like are a proper source of damages. And examination of these authorities show that such is the rule in Alabama, Illinois and Kentucky. In most of the other states, the rule is in conformity with Campbell vs. Chamberlain."

In this case the defendant in attachment counterclaimed against the plaintiff, and alleged that the attachment was wrongful and malicious, and claimed damages therefor.

The case of Weeks vs. Prescott, 53 Vt., 57, was an action of trespass to recover damages for wrongful attachment. Damages for interruption of business and loss of credit were claimed in the declaration and the referee in his report said:

"Plaintiff claims that he is entitled to recover for the interruption of business and loss of credit, and, against the objection of the defendant, introduced evidence tending to show that, in consequence of the attachment of the goods in question, he was thrown out of business and lost his credit, so as to be unable to purchase goods. I find this damage to be $300, and it results solely from the interruption of plaintiff's business and loss of credit."

But the Court said:

"The claim of the plaintiff on account of interruption of business and loss of credit is wholly disallowed."

See also Hutchinson Manufacturing Co. vs. Pinch,

91 Mich., 156, 51 N. W., 930, where it was held that the proper measure of damages for prevention of use of a mill was the rental value.

See also Levinski vs. Middlesex Banking Co., 92 Fed. Rep., 455 (5th Circuit); Witherbee vs. Meyer, 155 N. Y., 446, 50 N. E. Rep., 58; Trust Co. vs. Clarke, 92 Fed., 298.

AUTHORITIES RELIED ON BY THE BUCKI COMPANY.

Anvil Mining Company vs. Humble, 153 U. S. 540.

In this case the contract gave the plaintiff the right to mine all the ore in certain levels of a mine, for which he was to be paid a specified price. The Court held that the testimony with respect to the cost of mining, and the amount of ore remaining to be mined was sufficient to furnish a reasonable basis for ascertaining each of those facts. In that case, the profits claimed were the legitimate fruit of that particular contract, and their accrual was not made dependent upon the nature of other contracts, not yet entered into, which is the condition that the Bucki Company is in in this case; for, as stated above, it had no contract for the output of its mill which extended beyond January 1, 1898. There is no similarity between that case and the case at bar.

The Conqueror, 166 U. S., ——.

In that case the Court held, in effect, that the value of the use of the yacht, that is to say, its rental value, could be recovered, but there was no question of profits involved.

There are but three states in which damages for injury to credit can be recovered in an action upon an attachment bond. Thus, in Meyer vs Fagan, 34 Nebraska, ——, 51 N. W., 753, it was so held. Birmingham Dry Goods Co. vs. Finley, 26 So. Rep., 128, Alabama, and Hundley vs. Chadwick, 109 Ala., 505, 19 So. Rep., 845, and also in Dall vs. Cooper, 77 Tenn., 576. It appears from Mr. Sedgwick, in Sedgwick on Damages, that an exceptional rule exists in the states of Alabama and Tennessee. Thus, at Sec. 683, this author says:

"Under the Alabama and Tennessee statutes if the wrongful attachment be malicious, the injuries to credit and business and exemplary damages may be recovered

on the bond. The allowance of exemplary damages is based, in Alabama at least, on the peculiar wording of the statute, which expressly provides for damages for the wrongful or vexatious suing out of the writ." To the same effect see the opinion of Judge Hammond in Jarman vs. Stewart, 12 Fed. Rep., 268, where the statutes of Alabama and Tennessee are compared.

The cases of Grimes vs. Bowerman, 92 Mich., 258, and Willis vs. Naylor, 24 S. W. Rep., are actions of trespass on the case.

In the case of 86 Fed. Rep., 223 no damages for injury to credit were allowed.

The cases of—

Schill vs. Brokhus, 80 N. Y., 614.
Colrick vs. Swinburn, 105 N. Y., 503.
White vs. Mosely, 8 Pickering, 358.
Allison vs. Chandler, 11 Mich., 542.
Goebel vs. Haugh, 26 Minn., 252.
Luce vs. Jones, 39 N. J. Law, 707.
French vs. Conn. R. L. Co., 145 Mass., 261.
Chapman vs. Kirby, 49 Ill., 211.

were all cases of trespass to recover damages for the interruption of an established business, *as the direct result of force applied. The question of damages to credit was not involved in either of such cases.*

Special stress has been laid by counsel upon the case of Allison vs. Chandler, 11 Mich., 542. The correct rule is laid down on the subject in Hutchinson Mfg. Co. vs. Pinch, 91 Mich., 156, where it is stated that the value of the use of the mill while it was kept idle, that is to say, the rental value of the mill, was the measure of damages, and not the profits which might have been made out of the same.

AN ATTEMPTED DISTINCTION.

A.

It is contended that the general rule does not apply where an established business is interrupted, for the reason that the profits of that business in the past furnish a proper criterion of what they would have been in the future. Assuming this to be true, the exception would not

apply in this case, for prior to October 1, 1897, the Bucki Company had a contract with the Atlantic Lumber Company, which secured to it a steady supply of logs of a specified quantity and quality, and at a fixed price, and on October 1, 1897, that supply was cut off by a cause entirely independent of the attachment, to-wit, by the rescission of that contract by the Atlantic Lumber Company on account of the Bucki Company's failure to pay for logs delivered, in accordance with the terms thereof. The occurrence of this event would have made it necessary for the Bucki Company to embark in the business of supplying its own mill with logs, if it was to continue its business. This involved the purchase of large quantities of timber lands, the purchase of logging equipment, the construction of the necessary railroad, the purchase of railroad equipment, and the operation of its new business, the result of which would have affected its entire business, as already pointed out. The result of the business conducted by it prior to October 1, 1897, therefore, would have furnished no proper standard for estimating the results of the business that might have been conducted by it after October 1, 1897, as entirely new conditions arose.

B.

There was no accurate testimony as to the result of the previous business of the Bucki Company. Assuming the result of the business conducted by the Bucki Company prior to October 1, 1897, did furnish a proper standard for determining what would have been the result of the business engaged in by it after October 1, 1897, yet the evidence by which it attempted to show the results of that previous business is entirely insufficient for that purpose. After October 1, 1897, the Bucki Company converted virtually all of its assets then on hand into money. Thus, prior to December 28, 1897, it had shipped away from the mill and sold all of the lumber on hand October 1, 1897, and all the lumber subsequently manufactured, except about two million feet of old and second-class lumber, which was, on December 28, seized under writs of attachment sued out by other creditors (Rec., 187). This lumber was sold in the usual course of business and ap-

plied upon its orders as far as it would go. There is no testimony that it was sold for any less than it would have been sold for, had no attachment been levied. The amount realized from this lumber together with the value of the two million feet of old and second-class lumber attached by other creditors, and the value of the bills receivable on hand October 1, 1897, if deducted from the amount of the indebtedness incurred by the Bucki Company in carrying on its business operations, might have furnished a means for determining whether the business was being conducted with a profit. There was evidence tending to show that the Bucki Company realized $39,385.94 gross for the lumber shipped away from the mill after October 1, 1897 (Rec., 200, 201). In order to arrive at the net amount received for this lumber it would be necessary, of course, to deduct the cost of the 400,000 feet of logs purchased after October 1, 1897, and the cost of manufacturing into lumber said logs,and the three million feet additional supposed to have been on hand Ocober 1, 1897 (Rec., 186), which would have made a net return from the lumber much less than $39,385.94. But assuming that the whole of this amount was net and that $15,000 had been actually derived from the bills receivable reputed to be good, it would have shown its manufactured products to be worth $54,385.94, and the cost of producing the same to be, the amount of its debts, $64,000 (Rec., 193), in other words, that the cost of operating the mill exceeded by $10,000 the value of the products thereof. On October 1, 1897, the Bucki Company had but $112.50 in cash (Rec., 193).

But the Bucki Company discreetly adopted a different method of proving the results of its business operations. It introduced its mill reports, and showed thereby the quantity of lumber manufactured in each month, for the nine preceding months (Rec., 173), and it produced Charles L. Bucki, the president of the Company, as a witness to testify what the net profits of that business had been in each month (Rec., 173). This kind of evidence was entirely unreliable and illegal.

Central Coke & Coal Co. vs. Hartmann, 111 Fed. Rep, 96, Text 102.

In the case of Howard vs. Stillwell & Bierce Mfg. Co., 139 U. S., 203, the Court rejected testimony offered for the purpose of proving the profits that would have been made, which, it is submitted, were much more reliable than the testimony offered by the Bucki Company as above stated. In that case the party claiming damages offered to prove that they had purchased and held on storage a sufficient quantity of good wheat to have manufactured 200 barrels of flour per day during the period of 60 days that they were idle; that the market price of the wheat during that period was from 60 to 70 cents per bushel, the cost of converting it into flour was 80 cents per barrel; that they had in their employ the necessary laborers and skilled workmen to manufacture said wheat into flour, and were equipped with fuel and water and every other essential, except the parts and pieces of the mill contracted to be furnished by the defendants. That during the period of their detention, there was a ready cash market in Texas for the kind of flour that the mill was guaranteed to make at from $5.00 to $5.50 per barrel, and that they could have sold 200 barrels per day during the said period at $5.00 per barrel, and would have realized a profit of $1.00 per barrel from the said flour.

It is submitted that this testimony would have tended to establish the claimant's damages with a great deal more accuracy and certainty than would the testimony offered by the Bucki Company. There was lacking the same element in the case of Howard vs. Stillwell & Bierce Mfg. Co. that there was in this case, namely, the certainty that customers could have been obtained for the manufactured product. They might, or they might not have purchased. The Bucki Company had no contracts for the sale of the output of its mill for the period subsequent to January 1, 1898, and not only has there been a failure to show that they could have obtained the necessary supply of logs sooner, but the evidence demonstrates that it could not have been done.

SEVENTH SPECIFICATION.

The defendant requested the Court to instruct the jury to allow the plaintiff no damages on account of the plaintiff's inability to fill orders for lumber after October 1, 1897, if such inability was due to the fact that the plaintiff was unable to buy the logs from which to cut the lumber (20th exception, Rec., 192).

At page 187 the Record recites that the plaintiff was unable to completely fill the contracts which it had on hand on October 1, 1897, owing to the fact that it had not sufficient logs on hand from which to cut the orders and was unable to buy others.

There was only one way in which the attachments could have affected plaintiff's ability to buy other logs, and that was by the effect they had, if any, upon plaintiff's *credit*. Consequently it must follow that the charge was improperly refused. Had this charge been given, it would, to some extent perhaps, have neutralized the injurious effects of the charges just discussed.

III.

EIGHTH SPECIFICATION OF ERROR.

The plaintiff was permitted to introduce evidence tending to show that subsequent to October 1,1897, it was unable to completely fill a contract to supply a customer with lumber, and that such customer had purchased lumber on the market with which to fill out the order at a price in excess of the contract price and had *charged* the difference against the Bucki Company (Rec., 187). Upon this testimony the Court instructed the jury that the defendant was liable for all such losses, if any resulted as a direct consequence of the attachment. It was error to give this charge. It appeared that no injury was sustained through attachment of the logs and lumber from deterioration in value, and that there was no evidence to show that the property brought any less than it would have brought had no attachment been levied, and conse-

quently loss on these collateral contracts could not be recovered, and was too remote.

Vance vs. Vandercook Co., 170 U. S,. Text 480.
Burton vs. Holley, 29 Alabama, 318.
1 Sedgwick on Damages, Sec. 138.

NINTH SPECIFICATION.

The Court permitted plaintiff to introduce evidence tending to show that at the time of the levy of the writs of attachment it was negotiating for a loan, to be secured by a mortgage on its mill plant and lumber, for the purpose of showing that the consummation of this loan had been prevented by the attachment (Rec., 182). This testimony was incompetent.

Elder vs. Kutner, 97 California, 490.
Marx vs. Strauss et al., 93 Alabama, 453.

LOSS OF TIME OF EMPLOYEES.

IV.

TENTH SPECIFICATION.

The Circuit Court permitted the plaintiff to prove that, during the time the mill was under the lien of the attachment, the plaintiff employed four watchmen to watch the mill at an expense of $75.00 per week, and the defendant duly excepted to this evidence (13th exception, Rec., 184).

The lien of the attachment rested on the mill over twelve months, but during the whole of that time the plaintiff was never disturbed in its possession, and during most of that time the mill was being operated by the plaintiff or its lessee (Rec., 184).

Section 1651 of the Revised Statutes of Florida provides "that the levy of a writ of attachment shall not operate to dispossess the tenant of any lands and tenements." The testimony was improper and very injurious.

V.

ELEVENTH SPECIFICATION.

The Court permitted plaintiff to prove that at the time of the attachment it had a number of persons in its employ by the year, and that their employment dated from April 1 (Rec., 193). It also appeared that the possession of the mill was not interfered with at any time (Rec., 184). The sheriff held the logs for seven working days, and during that time the mill was not operated. At the expiration of that time the logs were restored to the plaintiff and the mill was operated at its full capacity until all the logs on hand on October 1 were sawed up, and the mill finally closed down November 16, 1897, for lack of logs to saw.

The levy of the attachment on the mill did not prevent plaintiff from operating the mill. The levy on the logs did not result in any direct damage to them, since the bill of exceptions recites that there was no evidence that they deteriorated while in the sheriff's hands, or that the lumber sold for any less than it would have sold for had no attachments been levied. The fact that these logs might have been sawed up during the seven days they were withheld by the sheriff, and the services of the employees utilized for that purpose, would not constitute a basis for the claim of the lost time of these employees, especially as the services of the employees were utilized in sawing up the logs within the year for which they were employed, for such damage, if any, was too remote.

Damages for detention of property must have respect to the property itself, and to a direct injury arising from the detention.

Vance vs. Vandercook Co., 170 U. S., Text 480.
Burton vs. Holley, 29 Ala., 318.
Fox vs. Harding, 7 Cush., 516-522.
1 Sedgwick on Dam., Sec. 138.
Elder vs. Kutner, 97 California, 490.

TWELFTH SPECIFICATION.

The evidence being as stated in the next preceding paragraph, the defendant requested the Court to instruct

the jury that the inquiry in regard to the loss of time of the employees should be limited to the period between October 1, 1897, and October 11, 1897, and that no damages could be allowed for any time lost after October 11.

Under any view of the case the defendant was entitled to this instruction. The instruction given at plaintiff's request permitted the jury to allow damages for time lost after November 16, 1897, when the mill was shut down because the Bucki Company was unable to purchase the logs with which to operate the mill, and the loss of time should at least have been limited to the period that the mill was shut down in consequence of the detention of the logs.

VI.

THE LAW NEVER PRESUMES THAT DAMAGES HAVE BEEN SUSTAINED, AND THERE IS NO PLACE FOR LEGAL FICTIONS IN THE LAW OF DAMAGES.

THIRTEENTH, FOURTEENTH, FIFTEENTH, SIXTEENTH AND SEVENTEENTH SPECIFICATIONS.

These specifications relate to the same subject matter and will be discussed together.

The bill of exceptions recites that there was no evidence to show that the lumber shipped from the mill was sold for any less than it would have sold for had no attachments been levied on it (Rec., 200), and that all the lumber had been shipped north and delivered to purchasers prior to Dec. 28, 1897, except about 2,000,000 feet of low grade stuff which was on that day seized by other creditors, yet the Court deliberately gave the jury the charges referred to in the 12th and 13th specifications, the first of which invited the jury to conjecture whether some damages had not nevertheless been sustained by reason of the continuance of the lien, and the second of which informed the jury that the plaintiff held this property as the bailee of the sheriff and was bound to redeliver it, etc., notwithstanding the evidence showed plaintiff sold all of it soon after the forthcoming bonds

were given, except certain lumber levied on by other creditors.

There being no evidence that damage resulted from these fictions or presumptions of law, it was error to declare them to the jury, for such a formal statement by the Court served as an invitation to the jury to supply the lack of evidence of damage by conjecture.

"Juries are sufficiently prone to indulge in conjectures without having possible facts not in evidence suggested for their consideration."

Railroad Co vs. Houston 95 U. S., 703.

By the charge quoted in the 14th specification the Court told the jury that in contemplation of law, the plaintiff held the proceeds derived from the sale of the lumber to pay any judgment that might be rendered in the attachment suits, and that he had the right to do so, and that they should award damages on this account for the whole length of time the attachments continued on the property, and by the charge mentioned in the 15th specification, the jury was told that it was their duty to determine how long these attachment liens continued. There was no evidence to show that plaintiff ever did hold the proceeds of the lumber a day after they were received (Rec., 201), and the Court refused to permit the defendant to show that these proceeds were used immediately after their receipt (Rec., 185, 14th exception).

This fiction of law is, perhaps, the most extraordinary that was ever invented, and is an example of what the genius of plaintiff's counsel is capable of. The men that devised the common law fictions would have stood still and admired if they could have seen the like of this.

The statement of the propositions stated in these charges is enough to condemn them. The law does not presume damages, they must be proven, and it was not the duty of the jury to determine how long the liens continued, as that was a matter of law. These instructions were very mischievous. The plaintiff had been permitted to prove that the order dissolving the attachment for $75,000 had been superseded, pending the appeal to the Court of Appeals, which disposed of the case in January, 1899, and the jury were, in effect, instructed to allow damages

on account of a fictitious idea, for all this time. Nor were they told what the measure of damages was. That also was left to their free and untrammeled imaginations. There being no definite evidence of what the lumber sold for, the jury might have experienced great difficulty in assessing damages had they been controlled by the rule applicable in cases of pecuniary loss, but the Court relieved them from that difficulty by telling them "that it was not necessary that an actual, positive amount be determined by you to a mathematical certainty or nicety" (20th specification, Rec., 203).

Another objection to these damages is that they were special and were not claimed in the declaration. For this reason, if for no other, they should not have been submitted to the jury.

Thorwegan vs. King, 111 U. S., 549.
S. F. & W. Ry. Co. vs. Tiedeman, 39 Fla., 196.

EIGHTEENTH SPECIFICATION.

The defendant offered to prove that the proceeds of the lumber were made use of by the plaintiff immediately after receipt and that they were not, in that respect, embarrassed by the forthcoming bonds and this specification of error relates to the rejection of this evidence (Rec., 185, 14th exception). It needs no argument to show that this evidence should have been admitted in view of the claim for damages made by plaintiff on account of the *presumption of law* that the proceeds were held to meet the plaintiff's contingent liability.

NINETEENTH SPECIFICATION.

The Court permitted plaintiff to prove that it gave the Surety Company that executed the forthcoming bond a mortgage on its mill plant to secure it as such surety, and that this mortgage was not released until June, 1899. This was error, for damage to credit from the execution of this mortgage was too speculative and too remote.

Under the authorities no damages could be recovered by reason of the fact that the lien of the attachment

rested on the mill, and certainly none could be recovered on account of this mortgage.

Elder vs. Kutner, 97 Cal., 490.
Marx vs. Strauss et al., 93 Alabama, 453.
Gerard vs. Moore, 24 S. W. Rep., 652.

VII.

TWENTIETH SPECIFICATION.

The Court instructed the jury that it was not absolutely necessary to find a positive amount of damages, determined with mathematical certainty. This was error, since all the damages recoverable in this case were of a pecuniary character.

"Damages not susceptible of legal computation, and which are shadowy, uncertain and speculative cannot be allowed."

Memphis vs. Brown, 20 Wallace, 313-318.

This charge was peculiarly objectionable in view of the charges given with reference to injury to business and to damages growing out of the presumed holding of the proceeds of the lumber. In neither of those cases was there any evidence from which any certain and "positive" amount of damages could be estimated, but this charge supplied the jury with what was lacking in the way of evidence and permitted them to allow damages when there was no evidence that any had had been actually and certainly sustained.

PART II.

BRIEF RELATING TO THE BUCKI COMPANY'S SPECIFICATIONS OF ERROR.

A full statement of facts has been given in the first part of this brief and it is unnecessary to repeat it here.

ARGUMENT.

I.

NO DAMAGES RECOVERABLE FOR INJURY TO CREDIT OR LOSS OF PROFITS.

The 1st to 20th and 22d, 24th 25th, 30th and 32d assignments of error filed by the Bucki Company related to the refusal of the Court to give certain charges relative to injury to credit and loss of profits. These charges were objectionable for the same reasons as certain other charges actually given by the Court, and which are challenged by the third, fourth, fifth and sixth specifications of error presented by the Fidelity Company and argued at pages 36 to 60 of this brief. The authorities on the subject are stated there, and the application of them is made, and the Court is requested to read that section of this brief in connection with these assignments of the Bucki Company.

II.

INTEREST ON THE VALUE OF LUMBER ATTACHED IS NOT RECOVERABLE.

The Bucki Company requested the Circuit Court to allow it interest on the value of the logs and lumber attached during the time the liens of the attachments rested thereon in contemplation of law notwithstanding the giving of the forthcoming bonds. This charge would not have been more injurious than some actually given, but there is no merit in it.

Fullerton Lumber Co. vs. Spencer, 81 Iowa, 549.
Hoyt vs. Fuller, 104 Fed. Rep., 193.

III.

THE ORDER OF THE COURT EXCLUDING TESTIMONY RELATIVE TO INJURY TO CREDIT AND INJURY TO BUSINESS.

The Court admitted a great mass of testimony relative to the credit of plaintiff, all of which showed, however, the plaintiff's credit since June, 1897, had been very bad. The Court also permitted the plaintiff to show that there were large bodies of timber lands near Jacksonville which plaintiff might have bought, if it had had the money, or the credit upon which to borrow the money. The Court likewise permitted the plaintiff to prove that L Bucki & Son, a partnership composed of certain stockholders of the plaintiff company, owned thirty-three miles of railroad and certain logging cars and locomotives (Rec., 69), and that Charles L. Bucki, the president of the Bucki Company, and James J. Hagey, its mill superintendent, had had experience in the logging business. The Court afterwards, on motion of defendant, ostensibly ruled this testimony out, but it is already shown the Court gave the jury certain charges which made it their duty to consider this testimony nevertheless. The Court made no error in ruling this testimony out, for the reasons heretofore given, and the only error committed was in giving charges which permitted the jury to consider whether the plaintiff had financial ability to continue in business subsequent to October 1, 1897 (Rec., 188, 189), thereby rendering its previous order ruling out this testimony wholly negatory.

IV.

THE CONTRACT WITH THE ATLANTIC LUMBER CO.

In the Court below the plaintiff sought to establish that the Atlantic Lumber Co. had no legal right to stop delivering logs on October 1, 1897. Certainly this question was immaterial, for the same consequences resulted from that rescission whether right or wrong, and, if wrong, the Fidelity Company could not be held responsible for the fact.

It has, however, since been held that the Atlantic Lumber Company was justified in stopping.

See L. Bucki & Son Lumber Co. vs. Atlantic Lumber Co., 109 Fed. Rep., 1061.

Respectfully submitted,

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[redacted]

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FIDELITY AND DEPOSIT COMPANY
OF MARYLAND

vs.

L. BOOKS & SON LUMBER COMPANY.

[redacted]

Answer of the Fidelity & Deposit Company
of Maryland to the Petition of the
L. Books & Son Lumber Company.

[redacted]

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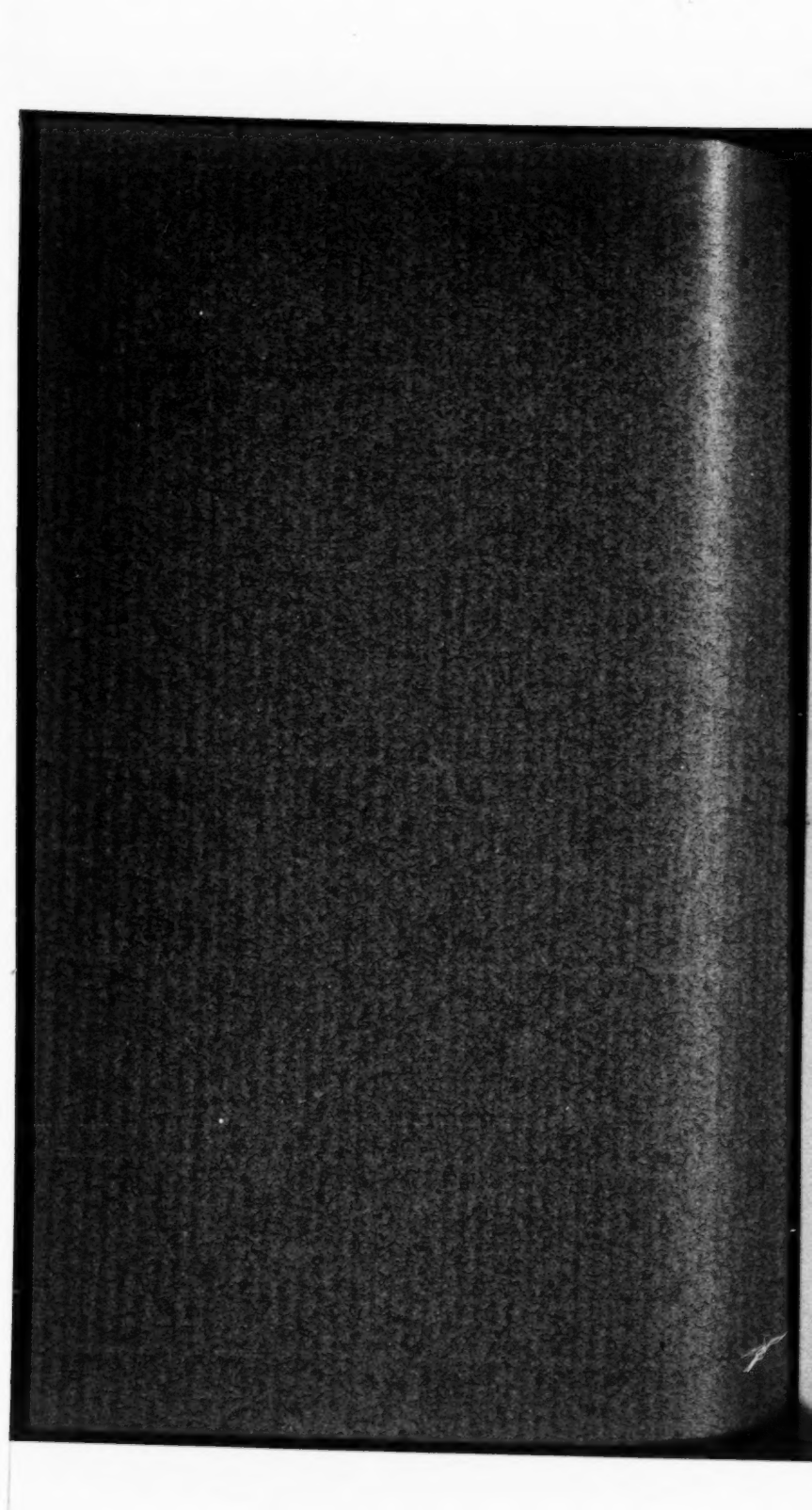


In the Supreme Court of the United States.

FIDELITY & DEPOSIT COMPANY OF MARYLAND,

vs.

L. BUCKI & SON LUMBER COMPANY.

UPON CERTIORARI.

The Answer of the Fidelity & Deposit Company of Maryland to the Petition of the L. Bucki & Son Lumber Company.

On October 1, 1897, the writs of attachment for $9,980.80 and $75,000 respectively, were levied on the logs and lumber of the Bucki Company, situated at its mill, and the writ for $75,000 was levied on the sawmill plant at the same time. The sawmill plant was a fixture, and constituted part of the realty. Under the Florida Statute, it is provided that realty shall not be taken possession of under a writ of attachment, and that the writ shall constitute a mere lien on the property. The Sheriff accordingly did not take possession of the plant, or prevent its operation. On October 9, 1897, the levy made under the attachment

for $9,980.80 was released by the giving of a forthcoming bond, and on October 11, 1897, the Sheriff permitted the Bucki Company to take possession of the logs, and convert them into lumber, and also permitted said Company to load its lumber on vessels as fast as they arrived. The mill was operated continuously under this arrangement till about November 7, 1897, by which time all logs in the boom on October 1, 1897, had been sawed up. The mill then closed down until November 12, 1897, when it was again started up and run until November 16, 1897, during which time it sawed up 400,000 feet of logs purchased by the Bucki Company after October 1, 1897. The mill was not run by the Bucki Company after November 16, 1897, because of its inability to procure an adequate log supply to operate its mill. On November 4, 1897, all the logs, lumber and personal property seized under the writ for $75,000 were released on a forthcoming bond. None of the logs, lumber or personal property deteriorated in value while under attachment, and prior to January 1, 1898, all the lumber had been sold and shipped away from the mill, except a lot of old and second-class lumber. There was no evidence which tended in any wise to show that the lumber brought any less than could have been procured for it had no attachment been levied. On or about February 20, 1898, the Bucki Company leased its mill for one year at the rate of $1,000 per month, and the lessee testified that he sustained a loss of $18,000 upon the operation of the mill that year. On February 5, 1899, the mill was sold at execution sale, issued upon a judgment obtained subsequent to October 1, 1897.

During the trial of the action upon the attachment bond, the Circuit Court permitted the Bucki Company to attempt to prove the following things :

1. That prior to October 1, 1897, it had been making a profit upon its business.

2. That prior to June 1, 1897, it had had a good

credit, and that subsequent to the attachment it had been unable to operate its mill for lack of credit, or the means wherewith to supply its mill with logs.

3. That on October 1st it had on hand certain orders for lumber which it had been unable to fill, owing to its inability, through lack of credit, to procure the logs from which to manufacture the same.

4. That the levy of the writ of attachment had prevented the Bucki Company from consummating a loan for $25,000.

5. That the Bucki Company had a number of persons in its employ, to whom it paid salaries during the time the mill was shut down, and that it employed certain watchmen to watch the mill during the time the lien of the attachment continued.

It appeared from the undisputed evidence that the commercial paper of the Bucki Company had been going to protest at intervals since June 1, 1897, and that on October 1, 1897, there was a piece of commercial paper for $5,340.75 which had been outstanding under protest, and unpaid since August 26, 1897, and that on October 1, 1897, the Bucki Company had in cash only $112.50.

The Court made the following order in reference to the testimony admitted:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, any damages arising from consideration of injury to credit, or loss of profits, would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted, as to the testimony relating to the cost of manufacturing of lumber, and the supply of timber lands, all testimony as to the damage to credit and loss of profits, and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the

profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered only for the purposes of determining the actual damages suffered during the time the operation of the mill was suspended, on account of the attachments, and the motion be denied in all other respects."

But notwithstanding this order, the Judge gave the jury a number of instructions which permitted them to assess damages on account of injury to business and lost profits, and the jury were undoubtedly largely influenced by these charges, and by the evidence admitted and subsequently ruled out. Five of these charges may be taken as specimens:

"Another element of damages claimed by the plaintiff is that the attachment interrupted its business, and by such interruptions and the consequences thereof, resulting from the attachments, the plaintiff was prevented from sawing and shipping lumber to certain parties in Baltimore, New York and Boston, which plaintiff agreed to furnish prior to October 1st, 1897; that losses consist of certain amounts the purchasers of the lumber had to pay to supply what they had purchased of plaintiff. The Court instructs you that the defendant is liable for all such losses, if any resulted as a direct consequence of the two attachments."

"You are the exclusive judges of the facts of this cause; you are the exclusive judges of the amount of damages the plaintiff sustained as the direct and proximate consequence of the issuing and levying of these writs of attachment. These damages consist of two general consequences: 1st. All moneys paid out and all expenses incurred in and about and attending to the preparation of the trial of the motions to dissolve the attachments, and on the trial of such motions, which become reasonably necessary as a direct consequence of such attachment. 2d. All consequential damages—that is, all damages caused by the interruption of the plaintiff's business, either by disabling the

plaintiff from operating its mill, or disabling it to deliver timber and lumber it had agreed to deliver prior to October 1st, 1897, if you believe from the evidence that direct and proximate effect of such attachments caused such interruption of the plaintiff's business."

"One of the principal points in this action is as follows: The plaintiff claims that it should be compensated for the loss of the use of its mill properties, caused by these attachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties, in consequence of the attachment, because, the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business, even if the attachments had not been issued and levied. This is a question of fact for you to determine upon all of the evidence in the case, and if you believe, from all of the evidence in the case, that if these attachments had not been issued and levied upon the plaintiff's properties, it (the plaintiff) would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as, upon the evidence, you feel convinced the plaintiff sustained, as a direct and proximate consequence of these attachments."

"The Court instructs you to award damages to the plaintiff, which it sustained by reason of, or in consequence of, the levy of the attachments upon all the timber and lumber and logs attached and to award such damages for the entire period of time the lien of the said attachments remained and continued upon the said timber, lumber and logs, considering any deduction from such damages from the fact of the forthcoming bonds, or indemnity bonds, were given by the plaintiff."

"It is your province and duty to determine under the evidence the length of time this attachment lien

remained upon and continued operative upon the property attached."

The Fidelity Company assigned error upon the charges upon its writ of error, and as pointed out by Judge Shelby in his dissenting opinion, the charges were in direct conflict with the decisions of the Supreme Court, and indeed, with the exception of Alabama, Kentucky and Tennessee, where exemplary damages by statute may be recovered on an attachment bond, there is only one State where such a charge would be upheld.

On page 8 of its petition, the Bucki Company alleges that the trial judge explained that he meant to instruct the jury to allow damages for interruption to business, for the period intervening between October 1 and October 11, 1897. There is nothing whatever in the record to justify this statement. The fact is, that at the time the trial judge ruled out the evidence referred to in the petition, and in answer to an inquiry of counsel, the judge remarked that it was with reference to that period that the evidence of profits was to be considered, but this remark was made on the day preceding that upon which the judge instructed the jury, and the heavy damages assessed show conclusively that the jury took advantage of the great latitude which the charges subsequently given allowed them.

It did not seem to counsel for the Fidelity Company that the right to recover damages on an attachment bond for injury to business, presented a question of such novelty as would justify this honorable Court in granting a writ of certiorari; and for this reason any reference to the assignments of error on this point was omitted. The Fidelity Company would welcome an opportunity to submit its assignments of error to this honorable Court, and would not oppose an order giving the Bucki Company leave to argue its assignments of error, provided the order gives the Fidelity Company leave to argue its assignments of error to the

charges actually given, relative to the measure of damages. And as this honorable Court will have all of the assignments of error and bills of exception of both parties before it upon this certiorari, this might be done. There can be no question that the Fidelity Company should be permitted to submit all of its assignments of error, if the Bucki Company is allowed to submit theirs.

Respectfully submitted,

RICHARD H. LIGGETT,

Counsel for Fidelity & Deposit Company of Maryland.

STATE OF FLORIDA, }
DUVAL COUNTY. } *ss.*

I hereby certify that on this 1 day of February, 1902, in the State and County aforesaid, before the undersigned, personally came Duncan U. Fletcher, who made oath before me that he is a local director for the Fidelity & Deposit Company of Maryland, and that he is informed and believes that the averments of the foregoing answer are true.

D. U. Fletcher

Sworn and subscribed before me this 1 day of February, 1902.

Russell C. Coleord

Notary Public, State of Florida.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

Supreme Court U. S.
FILED
MAR 13 1903
JAMES H. McKENNEY,
Clerk.

No. 220.

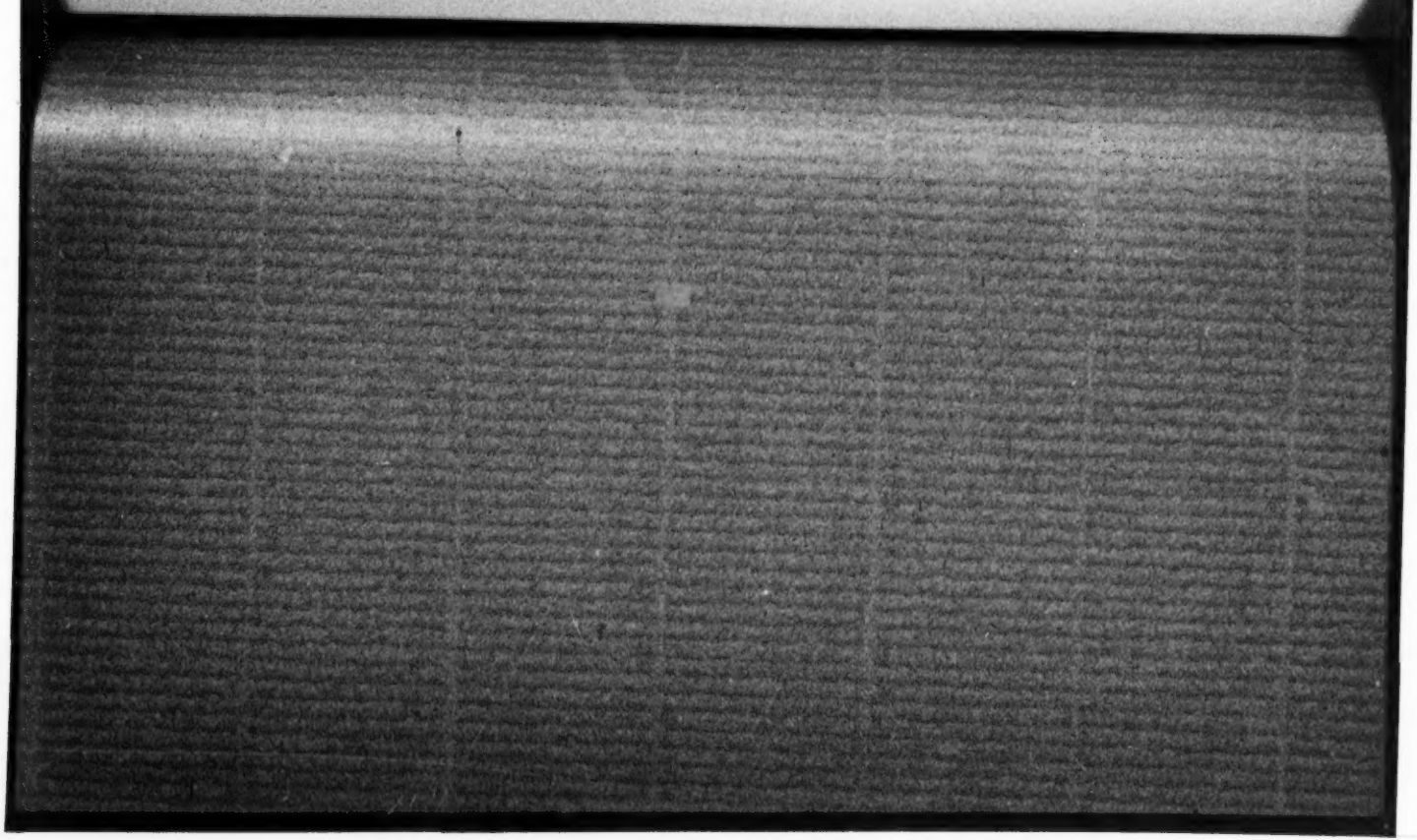
THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY.

SUPPLEMENTAL BRIEF FOR THE FIDELITY AND DEPOSIT COMPANY, FOR THE CORRECTION OF CERTAIN ERRORS IN THE BRIEF FILED BY THE BUCKI COMPANY.

RICHARD H. LIGGETT,
Counsel.



SOME OF THE MISSTATEMENTS OF FACT IN THE BUCKI COMPANY'S BRIEF, POINTED OUT.

I.

THE EXCEPTIONS OF THE FIDELITY COMPANY ARE IN PROPER FORM.

The plaintiff claims that the defendant has failed to state the ground of its exception except in two instances.

This is erroneous. Every exception urged in this Court contains a statement of the ground except the twentieth, twenty-first, twenty-second (Rec., 192, 193, 194), twenty-ninth, thirtieth, thirty-first, thirty-second and thirty-third (Rec., 202, 203, 204) exceptions.

And an inspection of the record will show that the exceptions to these charges were sufficiently specific.

The twentieth exception relates to the refusal of the Court to give an instruction confining the assessment of damages to the period between October 1st and 11th, and as the instruction speaks for itself, it was unnecessary to do more than to except generally. Besides, the subject had been called to the Court's attention by a motion to strike out all the testimony relative to loss of profits, as appears from Exception 19½ (Rec., 192). This was sufficient.

Felton vs. Newport, 92 Fed. Rep., 473.

The twenty-first exception relates to the Court's charging the jury to award damages for the loss of the time of the employés. (Rec., 193, 194.) The defendant excepted to the admission of this evidence on the ground of remoteness (Rec., 184), and had moved to strike it out on five different grounds (Rec., 185, 186), and had excepted to the refusal of the motion. Surely after this it was unnecessary to do more than to except generally. If that was not sufficient, the defendant urges the thir-

teenth assignment of error relative to the admission of this evidence. (Rec., 173.)

The twenty-second exception relates to the refusal of a charge whereby the Court was requested to confine the allowance of damages to the period between October 1st and October 11th (Rec., 194). This charge spoke for itself, and the subject had been repeatedly brought to the attention of the Court.

The twenty-ninth, thirtieth, thirty-first and thirty-second exceptions related to the same subject as the preceding four exceptions, which had been excepted to on various grounds, and the Court's attention must have been fully aroused thereby. (Rec., 202.)

The thirty-third exception relates to a question of law merely, and a general exception was sufficient. (Rec., 203.)

At the foot of each specification of error there is a reference to that part of the record where the exception is stated, and inspection will show that each exception is in proper form.

II.

THE VALUE OF PLAINTIFF'S ASSETS MISREPRESENTED.

The plaintiff's brief, page 44, gives an erroneous impression, both as to the quantity and value of plaintiff's assets.

The record contains these explicit statements on that subject:

"And the evidence adduced at the trial established the following facts:

"That the plaintiff had about 3,000,000 feet of logs in its boom on Friday, October 1, 1897, * * and about 5,000,000 feet of lumber. * * That the mill was closed down from October 1st to October 11th, or seven working days, and that the plaintiff started up its mill on October 11, 1897, and ran it at full capacity until November 7, 1897, during which time it sawed up the logs levied on; and on November 12, 1897, plaintiff resumed sawing and continued until November 16, 1897, during which time it sawed up about 400,000 feet of logs, which it had purchased after October 1, 1897,

and that the mill was then closed down for want of logs to saw." (Rec., 186.)

"That prior to December 28, 1897, all of the lumber on hand October 1, 1897, and that manufactured afterwards from the logs levied on, and that manufactured from about 400,000 feet of logs subsequently purchased, was delivered by the plaintiff to the parties in New York and Boston with whom it had contracts on October 1, 1897, except a portion of old or second-class boards, which was, on December 28, 1897, seized under the attachments of other creditors, and there was no testimony to show, or tending to show, that the plaintiff got any less for said lumber than it would have received had no attachment been levied, or to show that the lumber deteriorated while in the Sheriff's possession, or was injured in any way, and it was established by the evidence that the price of lumber improved after October 1, 1897; that there was shipped from the mill in October, 1897, 1,510,750 feet of lumber; 2,658,284 feet in November, and 950,324 feet in December." (Rec., 186.)

"And there was evidence tending to show that for the lumber shipped in October plaintiff received $14,055.74, for that shipped in November $22,846.57, and for that shipped in December $2,483.63." (Rec., 201.)

At another place the record recites—

"That the defendant, prior to December 28, 1897, sold all of the lumber which it had on hand December [October] 1st, and which it subsequently manufactured, and had shipped the same away from the mill, except about 2,000,000 feet, which was, on the 28th day of December, 1897, seized under the writs of other creditors." (Rec., 185.)

It appears from this, that the plaintiff, prior to December 28th, had cleaned up everything except the 2,000,000 feet of old stuff, and converted it into money. That the total quantity of lumber sold, including that manufactured from the logs on hand October 1st and from the logs subsequently purchased, was 5,120,358 feet of lumber. This is definite. And that the amount of money received for this total was $39,385.94. There is no evidence to show what was realized from the

2,000,000 feet of old stuff levied on by other creditors, or to show that anything was received for it.

From this $39,385.94 is to be deducted the cost of the 400,000 feet of logs subsequently purchased, and the cost of operating the mill after October 1, 1897, and other expenses of which there is no record.

The plaintiff proved that the mill was worth from $5,000 to $75,000, according as a person had use for it. (Rec., 87.)

And the testimony shows that it was sold at execution sale in February, 1899, for $2,300, to Henry Weiler, as trustee for Charles L. Bucki. (Rec., 73.)

The cost of plaintiff's mill was incompetent evidence.

City of Kansas vs. Frohwerk, 10 Kansas Appeals Reports, 120.

And its value after the cancellation of the log contract was entirely dependent upon finding a person with both the inclination and necessary capital to embark in the sawmill business.

Stockton tried a lease, and lost $18,000 in one year. (Rec., 188.)

Plaintiff admits, at page 45 of its brief, that the plaintiff applied the proceeds of this lumber to the payment of its debts, and it appears that after all the lumber had been sold, except the 2,000,000 feet of old stock attached by other creditors, and presumably after these proceeds had been applied to the payment of its debts, it still owed various creditors, for on February 22, 1898, it executed a mortgage on its mill plant to secure various debts, including a debt of $25,000, to one Henry Weiler, a director in the company (Rec., 204), and on that day it still owed the Atlantic Lumber Company over $8,000.

III.

THE MORTGAGE TO THE SURETY COMPANY.

At page 4 of plaintiff's brief it is stated that the plaintiff, on November 4th, gave to the Surety Company a mortgage on "all its timber, lumber and logs, aggregating over eight million feet," and upon its mill

plant, to secure the Surety Company against loss in the forthcoming bond.

The plaintiff has not, however, called attention to the fact that by the terms of the mortgage it was permitted to make sale of the logs and lumber in the ordinary course of business, the lien of the mortgage to apply to the proceeds. (Rec., 65.)

The defendant offered to prove that the plaintiff made use of the proceeds of this property without embarrassment (Rec., 185), and the plaintiff admits, in its brief, that it applied the proceeds to the payment of its debts (page 45 of plaintiff's brief). So it appears that this mortgage was a dead letter, in so far as the personal property was concerned. It neither affected the price for which the property was sold or embarrassed plaintiff in the use of the proceeds.

IV.

THE COST OF CONTINUING IN BUSINESS.

At page 57 of plaintiff's brief it is stated that "one Murphree testified for the defendant that to supply plaintiff's mill with logs would have required an investment of $150,000 to $250,000, including iron rails."

The plaintiff is not to be blamed for trying to lay the responsibility of this damning evidence on defendant's shoulders, but an inspection of page 87 of the record will show that plaintiff adduced this evidence, and by a leading question at that.

V.

THE JUDGMENT OF THE ATLANTIC LUMBER COMPANY.

It is stated, at page 7 of plaintiff's brief, that the judgment of the Atlantic Lumber Company for $8,000 has been adjudicated to be for $4,000 too much. It is true that the Circuit Court of Appeals has held that a bill in chancery will lie to review the rulings of the Circuit Court on a motion for a new trial, but this was

on demurrer to the bill of complaint, and the suit is still pending on answer to the bill.

This anomalous decision will be found in the case of L. Bucki & Son Lumber Co. vs. Atlantic Lumber Co., 116 Fed. Rep.

VI.

THE MERITS OF THE ATTACHMENT SUIT FOR $75,000.

Counsel for the Bucki Company has devoted considerable space to the discussion of the subject of attachment for unliquidated damages. Neither this subject nor any other relating to the merits of that attachment is now before the Court. It is sufficient that it was dissolved. The Circuit Court, however, after full discussion, held that an attachment for unliquidated damages arising out of this contract, could be maintained—as the contract furnished an exact standard of admeasurement.

Respectfully submitted.

R. H. LIGGETT,

Counsel.

320

FILED
FEB 3 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

A Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the Action No. 925 in said Court.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for Petitioner.

In the Supreme Court of the United States.

In re. Petition of L. Bucki & Son Lumber Company, a Corporation, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in case No. 925 in that Court.

Comes now the petitioner, L. Bucki & Son Lumber Company, by H. Bisbee and George C. Bedell, Esqs., its attorneys, and presents its petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit in the cause No. 925 in said Court, praying reference to a complete Transcript of the Record in the said cause, and eleven copies thereof filed with the Clerk of this Honorable Court on a petition of Fidelity and Deposit Company for certiorari to said United States Circuit Court of Appeals, granted by this Honorable Court on the twentieth day of January, 1902, with briefs in support of the said petition, and thereupon moves this Honorable Court for leave to file the said petition, and for the writ of certiorari as prayed for therein.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for L. Bucki & Son Lumber Co.

NOTICE.

The attorneys for Fidelity and Deposit Company, defendant in said cause are hereby notified that the above motion will be made and said petition presented on Monday the 3rd day of February, 1902, or as soon thereafter as the said motion can be submitted.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for L. Bucki & Son Lumber Co.

Service of the foregoing notice and receipt of copy of petition and motion acknowledged. R. H. LIGGETT,
Attorney for Fidelity and Deposit Co.

January 25, 1902.

To the Honorable the Justices of the Supreme Court of the United States:

A Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, in the Action No. 925, in said Court.	Petition for a Writ of Certiorari.

The L. Bucki & Son Lumber Company respectfully shows, that on the 21st of January, 1902, this Honorable Court, on the petition of the Fidelity and Deposit Company, of Maryland, the defendant in the said action, granted a writ of certiorari to said United States Circuit Court of Appeals. To the granting of the said writ, your petitioner made no opposition.

Second.

That the said action was brought, by your petitioner as plaintiff against the said defendant, to recover damages on its liability as a surety upon two bonds, given to obtain two writs of attachments at the suit of The Atlantic Lumber Company against your petitioner.

The conditions of the said bonds were in the language of, and according to the requirements of Section 1646, of the Revised Statutes of Florida, in the words and figures following, to-wit: "Bond.—No attachment shall issue until the person applying for the same, his agent, or attorney, shall enter into bond, with at least two good and sufficient sureties payable to the defendant in at least double the debt or sum demanded. *Conditioned to pay all costs and damages which the defendant may sustain in conse-*

quence of the plaintiffs' improperly sueing out said attachment."

See condition of the bonds. Record No. 925, pp. 5 and 10. [A subsequent statute makes a surety on the bond sufficient.]

Third.

The said writs were issued as auxiliary writs, in two common-law actions, instituted on the 1st day of October, 1897; in the first of which actions the plaintiff therein laid its damages at $15,000, based on a claim for the price of logs sold and delivered, under a written contract. The second action, on the same day, claimed $200,000 unliquidated damages, and based on the theory of profits expected to be made by the plaintiffs therein, by performing the unexpired period of the said contract, which was three and a half years; and on the theory that your petitioner, the defendant in said actions, had breached the said contract. Personal service of summons was made in both of said common-law actions.

Fourth.

Said writs of attachment were for the amounts, respectively, of $9,980.80, and of $75,000, and were levied upon your petitioner's mill plant, with a capacity of about 80,000,000 feet of lumber per year, and which cost about $150,000, and were levied upon about 5,000,000 feet of manufactured timber *and lumber* in its yards, and on 3,000,000 feet of logs in your petitioner's boom pens, and all the other property of petitioner in Florida.

See returns of Sheriff, Record, p. 56.

Fifth.

That each of the said writs of attachment were dissolved on your petitioner's motion, thereby establishing that they were "*improperly* issued," and thereby establish-

ing that the said surety was liable in damages on its said bonds. The important if not the only principal question in the trial of your petitioner's action against said surety upon the said bonds, was, *what were the* elements of damages, for which the said surety was liable, upon the terms and conditions of the said bonds, whereby the said surety *covenanted to pay all costs* and damages which the defendant (in said attachment) may sustain "*in consequence of improperly sueing out said attachments.*"

See Bonds and Revised Statutes aforesaid.

The only defense was the plea of non-damificatur.

Sixth.

Your petitioner avers that, in and by the said petition by the said surety, for the writ of certiorari granted as aforesaid, it presented but *one alleged error* of the said Circuit Court of Appeals *to its* prejudice, to-wit: That, under the conditions of the said bonds, fixed by the said statute, the said surety was not liable to pay as damages reasonable attorney's fees, incurred for the service of obtaining the dissolution of the said attachments, whereas said Court of Appeals ruled the said surety was liable for such damages.

But, your petitioner avers that, in the trial of the said action in the Circuit Court, and on assignments of error in the said Appellate Court, on exceptions duly taken to the several alleged erroneous rulings of the said Circuit Court, your petitioner contended and insisted that the said Circuit Court had made several erroneous rulings to your petitioner's prejudice, in respect of the measure of and elements of damages, *other than the said attorneys' fees*, whereby your petitioner's just recovery was largely reduced. And the said Appellate Court, by the rendition of its judgment, overruled said assignments of error.

Seventh.

Your petitioners avers that, by the very condition of the said bonds, the said surety was bound *to pay consequential damages*, and the measure of its damages was the same as the plaintiff's in attachment, to-wit: "All costs and damages *in consequence* of improperly issuing the said writs.

That at the trial of the said action the trial judge admitted evidence establishing, or tending to establish, that *in consequence* of the levy of the said attachments amounting to about $85,000 *upon all of the said properties* including lumber and logs on hand, of the value of at least $80,000, *constituting petitioner's entire stock* in *trade*, *and constituting all its means of buying logs and continuing its business*, your petitioner was unable to continue and was prevented from continuing to do any business whatever, for the period of *twenty months and upwards*, *for which period of time plaintiff in attachments maintained the lien of the said attachments by the levy thereof*, and by writs of error from the said judgments dissolving the said attachments and by writs of error from the final judgments in the said common-law actions, and by applying to this Honorable Court for a writ of certiorari, which was denied.

Eighth.

Your petitioner avers that, at the said trial, the said trial judge admitted evidence establishing, or tending to establish, that, if the said writs had not been levied upon all its properties aforesaid, your petitioner would have been able to continue in business at a large profit, and admitted the books of your petitioner, establishing that for the period of *nine months prior* to October 17, 1897, the date of such attachments, petitioner *had made in its business a net profit* of about $5,000 per month for each of the said nine months.

Ninth.

Your petitioner avers that, at the trial aforesaid, evidence was admitted establishing, or tending to establish, that *in consequence* of the levy of the said writs upon all its properties aforesaid, and preserving the lien thereof, as aforesaid, for the twenty months aforesaid and upwards, your petitioner was unable to obtain any means, money or credit, by reason of the ownership of the said large properties, so levied upon as aforesaid, while said lien remained thereon, whereby to continue to conduct its business as a manufacturer of lumber and timber, and whereby *the use* of its said mill properties, for the said twenty months and upwards, *was wholly lost to your petitioner*, all of which appears of record in the bill of exceptions in No. 925, p. 79 et seq.

Tenth.

Your petitioner avers that, at the close of the adducing of testimony, in the said action on the said bonds, on motion of the said surety company, the said trial judge *excluded from the consideration of the jury, all of the aforesaid evidence* adduced upon the points aforesaid, and ruled and decided that he would not submit, and did not submit to the jury the question of any damages sustained by petitioner in consequence of the said attachments *in respect to loss of profits as aforesaid*, or in respect to *damages for the loss of the use of its said mill properties or in respect to inability to obtain means, money, or credit to continue in business while* the lien of the said attachments was pending, except during the period of time from October 1st to October 11, 1897. *All of which appears in the said bill of exceptions in the said Record No. 925*, pp. 112 to 115, inclusive, setting forth *the said motion to exclude such evidence and the order of* the trial judge thereon, and the reasons of the judge for such order.

To all of which rulings of the said trial judge, petitioner duly excepted and assigned errors thereon. And

your petitioner requested numerous instructions to submit all such questions and elements of damages to the jury, which instructions were refused, and to such refusals your petitioner duly assigned errors on the ground that each was a proper element of damages, and that to take such questions from the jury, was an invasion of your petitioner's constitutional right of trial by jury.

See assignments of error, Nos. 1, 2, 3, 4. Record, p. 32 to 34.

Nos. 8, 9, 10 and 11. Record p. 36 to 39.

Eleventh.

And after argument of counsel to the jury, the said trial judge, upon his own motion, further charged the jury as follows, to-wit:

"All these questions that have come up in regard to the damages; *all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider;* the only question is a clear cut question; it is how much damages did the Bucki Company suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied, there were two common law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that of The Atlantic Lumber Compay cancelled its contract, or considered it cancelled. That is The Atlantic Lumber Company refused and ceased to deliver any more logs to the Bucki Company. *So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs and the common law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.*

"The law is distinct that where a party sets in motion a wrong an intervening wrong will not prevent the party instituting or setting in force that wrong from being liable for all damages which can be directly traced to that.

"But in this case the attachment did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments; not how much they suffered by reason of all the attending circumstances, but how much they suffered by reason of the issuing of the attachments.

"If there is any question upon which the Court considers a verdict would not be justified in any way in which it might be viewed then it is the duty of the Court to withdraw from the jury that question.

"As I say, that law is that all damages that can be awarded against a surety on the bond where there is no malice alleged, where a party merely becomes responsible for the *direct damages that have been caused, the damages must be strict and positive.*

"Taking into consideration the several causes, contemporaneous tending to interfere with the business of the Bucki Company, tending to injure their credit or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in this case.

"I have therefore as you have seen in the course of the case granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit. As I say, there was so much uncertainty, that there was no certainty under the law for determining what damages have been suffered by the party in this case. I therefore instruct you, gentlemen, that the damage must be confined to the damages suffered by the detention of

the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff. To the giving of which charge the plaintiff duly excepted on the ground that plaintiff was thereby deprived of his right to trial by jury, and other grounds."

Record, p. 131.

See pages 129, 130, 131, and assignments of error thereon.

No. 24 Record, p. 33 to 36, and your petitioner avers that the said trial judge subsequently explained what he meant by detention of the mill property from petitioner's possession, which explanation was that the plaintiff, by and with the consent of the sheriff, resumed sawing on October 7th, 1897, and continued to saw until all the logs in the boom levied on were cut, the lien of the attachment to be upon the manufactured product of such logs, in lieu of the logs themselves, and that the said logs were all sawn by November 16th, 1897, and the said judge explained that he meant to instruct the jury to allow damages as profits from the 1st to the 11th of October, *only because* the logs in the boom were seized under the attachment, and *during that time* plaintiff was prevented from operating its mill. But after the 11th of October the surety was not liable to damages for any interruption of business, *because such damages were too remote*. And Judge Shelby ruled that the surety was not liable to damages for interruption of business, even from October 1st to October 11th.

See Judge Shelby's opinion, Record 158, and not afterwards.

See Record, p. 19, near top.

Twelfth.

Your petitioner respectfully submits that by the fifth paragraph of Section 6, *creating* the said Circuit Court of Appeals, it was intended by Congress that whenever this

Honorable Court should by certiorari cause any case to be certified for its "*review and determination*, the Court should decide all questions of law essential to the disposition of the case upon their merits, if a decision of all such questions is seasonably applied for.

Thirteenth.

Your petitioner respectfully submits that there is as much, if not greater, conflict in the decisions of the inferior Federal Courts and State Courts in respect to the liability of a surety or surety company, upon attachments issued under statutes similar to those of Florida, for damages for the loss of the use of property of the defendant in attachment; and for damages by way of loss of profits by interruption or obstruction of business, and for damages for loss of credit, as a direct or consequential result of such attachments as there is conflict in respect to such surety's liability for attorney's fees incurred, in obtaining a dissolution of such attachments, on interlocutory motions, and that an authoritative declaration of this Honorable Court upon the questions of liabilities of surety companies in respect to the former damage is as of great importance to sureties and attachment debtors as it is in respect to attorney's fees.

Your petitioner avers that among the judges of the lower courts there was a direct conflict of opinion on questions of damages *other than those of attorney's fees*, in this Court; that two of the judges of the Appellate Court sustained the trial judge *upon all questions presented, except attorney's fees;* while the third, Judge Shelly, so far differed from the trial judge that he wrote an opinion in favor of reversing the entire judgment.

As explained in this petition, the trial judge ruled that the surety was liable to damages for interruption of business *from October 1st, 1897, the date of the levy of the writs, to October 11th of that year.*

Fourteenth.

Your petitioner submits as a further reason why the prayer of this petition should be granted, that, in the event this Honorable Court should find reasons upon the assignments of error by the said The Fidelity and Deposit Company to reverse the entire judgment in this action and direct a new trial, it is important and for the interest of both parties and the public that all questions of law arising upon the assignments of error by your petitioner, should be ruled and declared by this Court not only to guide the trial judge in such new trial, but to inform the public as to the measure of damages to which such surety companies will hereafter be liable in such and like cases. Wherefore, the premises being considered, and inasmuch as the Transcript of the Record of said cause is already in the possession of this, the Supreme Court of the United States, upon the petition of the said The Fidelity and Deposit Company of Maryland, your petitioner prays that a writ of certiorari may issue to review the said cause upon this petition, or that in lieu thereof this Honorable Court may be pleased by its order hereon to authorize your petitioner to file assignments of error in said court upon the said rulings of the said Circuit Court, and of the said Circuit Court of Appeals, and that your petitioner may be heard thereon upon the trial of this cause as fully as if the writ of certiorari had been granted on this petition, and your petitioner will ever pray, etc.

THE L. BUCKI & SON LUMBER CO.
By H. BISBEE,
Counsel for Petitioner.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for Petitioner.

STATE OF FLORIDA, }
DUVAL COUNTY. } ss.

Personally appeared before me Horatio Bisbee, to me well known, who, being sworn, says on oath that he is the attorney for the above-named petitioner; that no officer thereof familiar with the facts of the said petition is now in the State of Florida, and that affiant is familiar therewith, and that the facts in the said petition stated are substantially true, as stated.

H. BISBEE.

Subscribed and sworn to before me this ..... day of .....1902.

.....

No. 513
FILED
FEB 3 1902
JAMES H. McKENNEY
By. of Bisbee & Bedell for Pet.
Filed Feb. 6, 1902.

In the Supreme Court

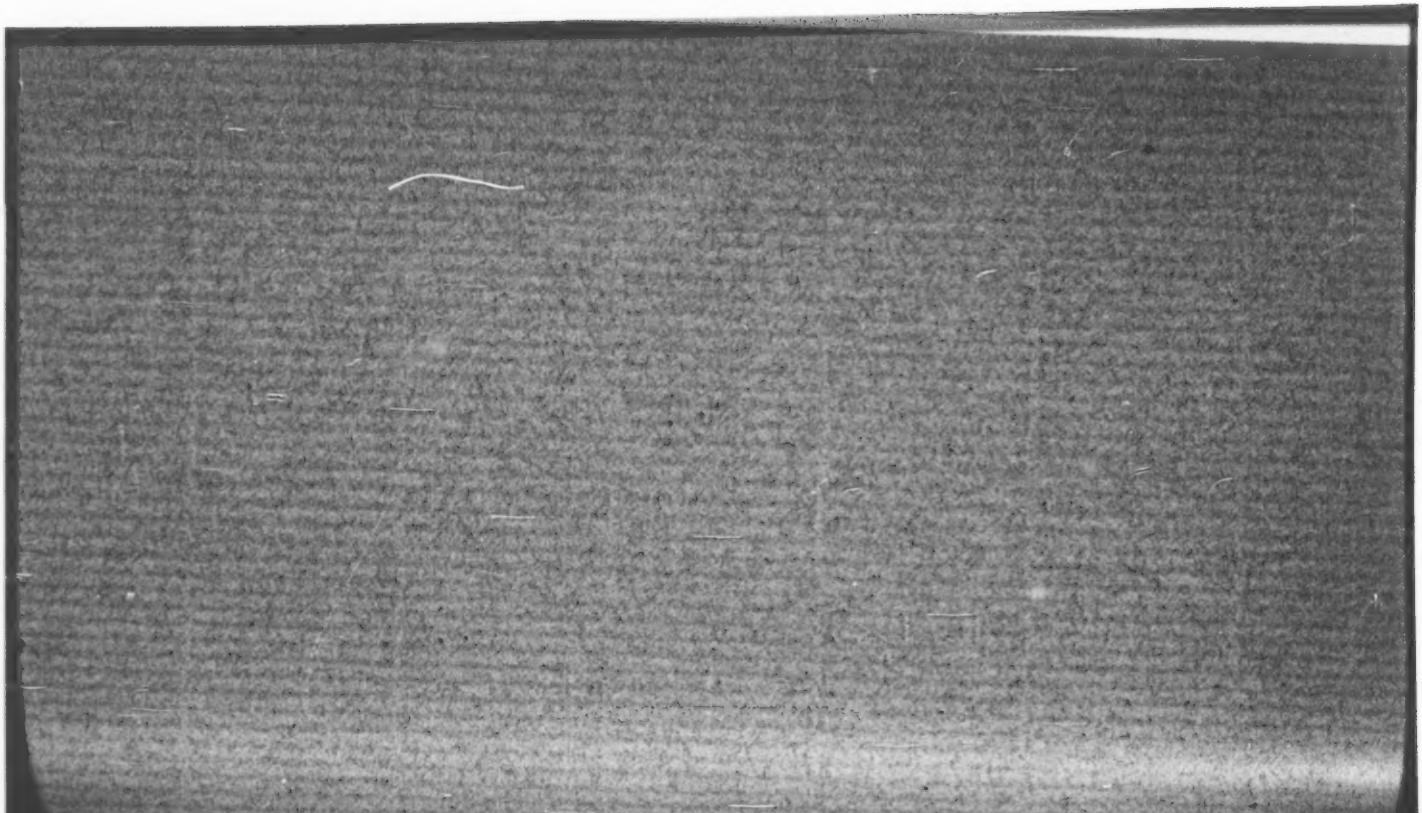
United States.

In Re Petition of the L. Bucki & Son Lumber Company for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit. In No. 925, of that Court.

BRIEF IN SUPPORT OF THE PETITION.

H. BISBEE, ESQ.,
GEORGE C. BEDELL, ESQ.,
Counsel for Petitioner.

1902.
PRESS OF THE H. S. PH. E. BREW COMPANY,
JACKSONVILLE, FLA.



In the Supreme Court of the United States.

In Re Petition of The L. Bucki & Son Lumber Company for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit. In No. 925, of that Court.

BRIEF IN SUPPORT OF THE PETITION.

This Court having granted a Writ of Certiorari on the Petition of The Fidelity and Deposit Company of Maryland, the defendant in this action, the plaintiff, The L. Bucki & Son Lumber Company, petitions for a like writ, or some order by which it can be heard on assignment of errors, alleged to be to its prejudice. Without such an order your petitioner can not be heard upon its assignment of errors.

Hubbard vs. Tod, 171 U. S., 474.

The suit was *for breach of contracts. The contracts were bonds, wherein the defendant Surety Company covenanted* "to well and truly pay all costs and damages which The L. Bucki & Son Lumber Company *may sustain in consequence of it*—the said Atlantic Lumber Company *improperly suing out said attachment.*"

The attachments were dissolved on motion of plaintiff, and the properties levied on ordered to be

returned to it. See judgments dissolving the attachments, Rec. No. 925, pp. 59-61.

There is no exception to the rule of law, that upon the dissolution of the attachments the plaintiff in attachment and the surety on its bond become liable to same damages. The surety is liable to the same measure of damages as the attaching creditor in the absence of ~~notice.~~ *malice.*

The question upon which there is a conflict of authority is, *what are the elements of damages in such cases?*

Points of Law.

Upon this petition it is, we think, only incumbent upon petitioner to establish a *prima facie right* to be heard upon its own assignment of errors, because there was a writ of error and *a cross writ of error* to review the judgment of the Circuit Court, and both were heard together in the Appellate Court as one case.

To establish such *prima facie* case we rely upon the following points :

(A) That this Court can better understand and have a clearer comprehension of the questions of law raised by the assignments of error by the defendant, by hearing argument upon assignments of error claimed to be prejudicial to the plaintiff.

(B) That, in view of the event that this Court may reverse the entire judgment and order a new trial, it is proper and expedient that all questions of law drawn into dispute should be finally decided, in order to conclude the trial judge on questions of law on such new trial, in the interest of preventing further litigation between the parties, and in the interest of the public that litigation cease.

(D) That there is such a conflict of authority in the Federal and State Courts in respect to the liability

of a surety upon an attachment bond (like those in this suit) for damages arising from *interruption of business and to credit in consequence of such writs of attachment*, and upon other elements of damages, that an authoritative decision by this Honorable Court would be *of general public importance*, not only to sureties and surety companies (which of late years have taken the place of natural persons), but to creditors and debtors throughout the United States.

(E) The *case at bar* illustrates the importance of these questions in this: that if the attaching *creditor and surety are not liable for damages for the interruption of the business, or injury to credit, of the attachment debtor, it follows that if* the facts are such that such alleged debtor can not sustain an action *for malicious prosecution; then*, though as held in this case, there was no ground for the attachments, the *plaintiff here must bear without recompense* the loss of the profits of its business, a loss of the use of its extensive mill plants for twenty months and upwards, amounting to at least $100,000.

(F) In the case at bar the trial Judge refused to submit to the jury *the question of the amount of damages sustained in consequence of the writs of attachments, because the attaching creditor—the Atlantic Lumber Company—contemporaneously with such writs brought common law actions*, and *contemporaneously* refused to deliver to plaintiff any more *logs under its unexpired contract* binding it to deliver 2,000,000 feet of logs, board measure, per month, for the further period of three and one-half years. And such refusal to submit to the jury was placed by the trial Judge on the *distinct ground* that it *was impracticable* for the jury to determine *how much damage such writs caused separate and apart* from the damage caused by such common law suits and by the refusal to deliver any

more logs, consequently plaintiff was entitled to no damages. The learned trial Judge treated the two last causes *as contemporaneous, contributory causes* of damage, with the writs of attachment. Such ruling of the Court was made without request by defendant, and without opportunity of plaintiff's counsel to argue such question.

Thus plaintiff's right of trial by jury was invaded. See Record, p. 129, last part p. 130.

It is submitted that this presents a *question of gravity and of great public interest in like cases.*

Points of Law and Authorities.

In Dushone vs. Benedict, 120 U.S., 630, it was held that on a breach of contract of sale of rags, *to be clean and free from infection*, and suitable to be used by the buyer as a manufacturer of paper, such manufacturer could recover damages for *interruption of his business* and loss of custom in consequence of smallpox being communicated to his employees from such rags.

That case was reversed because the trial judge *took the case from the jury on the ground that the testimony was too indefinite and uncertain* upon which to base a verdict. Id., 647.

In that case the seller of the rags had not covenanted expressly to pay *consequential damages*, but this Court held him liable to such damages as a *result of his breach of warranty.*

In the case at bar the defendant expressly *covenanted* to pay "*all* costs and damages the L. Bucki & Son Lumber Company *may sustain in consequence of it*—the said Atlantic Lumber Company—improperly *suing out said attachments.*" Rec. No. 925, p. 5.

Here, then, defendant *expressly covenants to pay consequential damages.*

In the case of the "Conqueror," 166 U. S., 110, this

Court held the Collector of the port, for seizure of the steamer (no element of malice being present) was liable for "the value of her use to the owner while detained, and the loss of the use of the steamer was a proper measure of damages, and that the books of her owner, showing her earnings prior to the detention, are admissible to show *probable future earnings.*

There was no element of malice in that case, but it was rested on the ground of an *innocent, illegal seizure,* depriving the owner of the use of his property.

Nor was there any *contract* that the Collector, as innocent trespasser, *would pay consequential damages.*

In Anvil Mining Company vs. Humble, 153 U. S., 540–550, this Court held that on *breach of a mining contract,* the party committing the breach, *preventing performance,* was liable to the other for *expected profits,* though there *was considerable uncertainty* as to the quantity of *ore remaining in the mine.* Id., 550.

Certainly it is a general rule—though there are conflicting decisions—that a party preventing the other from *performing a contract* is liable to damages for interrupting an *established business,* because such damages may be reasonably inferred to have *been in contemplation* of the party committing *the breach.*

On principle, how can the case at bar be distinguished? Here, the surety covenants to pay *consequential damages.*

Trespasses.

As soon as the attachment is dissolved, the attaching creditor becomes a trespasser for all acts done while the writ was in force.

28 New York, 66.

86 Fed., 223.

Hondley vs. Chadwick, 109 Ala., 505; S. C., 19 S. R., 845.

If he is a trespasser, *without malice,* yet he is liable

to all damages directly consequent from the levy of the writ. Under the Florida Statute, the surety covenants to pay the exact amount of damages the attaching creditor is liable, *in the absence of malice.*

Damages Reasonably Contemplated by the Surety When he Covenants to Pay Them.

1st. When it signs the bond, through its local agents, the surety company is chargeable with knowledge that the writ will issue.

2d. He is chargeable with knowledge that the writ will be levied, and as a consequence, the alleged debtor's property *will be seized and taken from his possession.*

3d. In case at bar, the surety is chargeable with knowledge that the plaintiffs were engaged in the manufacture of timber and lumber; that the writs would be levied upon its mill plant, and sufficient timber and lumber and logs to satisfy the amount of the writs, or $85,000; and that all such personal property would be taken from the plaintiff's possession.

4th. The surety was chargeable with knowledge, or notice, that, like any merchant or manufacturing company, plaintiff's logs and manufactured product was his *stock-in-trade*, which was its means, or basis of credit, upon which it relied to do business and continue to buy logs and sell lumber.

5th. It is, therefore, presumed to have contemplated such damages as, upon inquiry, it would have known would ensue, to-wit: damages by the interruption of plaintiff's business and injury to its credit and loss of profits.

6th. No attaching creditor, or his surety, has the right *to contemplate* that a business man, when his stock-in-trade—his very means of continuing in business—is attached and taken from his possession, *has money in bank*, or other property by the use of which

he can continue in business, notwithstanding such attachments.

It is, therefore, submitted that a *prima facie* case, to have the questions of damage by the loss of use of the mill plants, of profits and *injury to credit, reviewed and settled*, is made out.

Cases Showing a Conflict of Authority upon Subjects of Damages from Loss of Use of Property, Loss of Profits and Injury to Credit, from an Attachment.

The following are some of the cases where such damages were allowed:

Flourney vs. Howe, 70 Ala., 308.

Pollock vs. Gantt, 69 Ala., 373.

Hondley vs. Chadwick, 109 Ala., 505.

Birmingham Dry Goods Co. vs. Finley (Ala.), 26 So. Rep., 138.

1st Shinn. on Attachment, 343-344, citing Doll vs. Cooper, 77 Tenn., 576.

22 Fed. Rep., 220.

Myer vs. Sayon, 34 Neb., S. C., 51 N. W.; 753.

Kyd vs. Cook, 56 Neb., 76; 51 N. W., 753.

Lewis vs. Taylor (Texas Civil App.), 24 S. W. Rep., 92.

Houyen vs. Hockmeister (New York Appeals), 21 N. E. 1046.

92 Mich., 258.

92 Ill. App., 606-615.

139 Ill., 109.

1st Sedgwick on Damages, Sec. 127, p. 184.

1st Sutherland on Damages, Sec. 77.

Phehue vs. Royal Bank, 5 L. R. Ex., 92.

Blair vs. Kinch, L. R. Ir., 274.

Elder vs. Kutner, 97 Col., 49.

To the contrary are—

Seattle Crockery Co. vs. Haley, 6 Wash., 302.
8 B. Munroe, 51.
8 B. Munroe, 160.
34 Ark., 707.
19 Mo., 613.
9 Rob. La., 90.
10 Iowa, 349.
18 Fed., 312.
35 Fed., 395.
34 Fed., 474–476.

Two or More Contemporaneous Causes

It was error of the Appellate Court not to reverse the judgment on the ruling of the Circuit Court that there were *three contemporaneous or concurring causes of damages*, to-wit: the attachments, the common-law suits, and refusal to deliver logs after the date of the attachments, and for that reason the trial judge refused to submit to the jury the damages caused by the attachments.

There is no authority for such a ruling. Neither an innocent trespasser, nor a malicious trespasser, can apportion his wrong or damages; and the injured party may sue either one or all of the persons causing damage, where there is more than one.

If defendant sets up that from another cause the injury happened, he must prove that the injury must have happened if his act complained of had not occurred.

Davis vs. Garret, 6 Bing. 716, by Ch. J. Tindall, a case which has been followed in this country.

In Grimes vs. Bowerman, 92 Mich. 258, s. c. 53 N. W. Rep. 751, which was an attachment case, the Court, in the syllabus, said :

"Where the plaintiff has been injured in his per-
"son or property by the wrongful act of the defendant,

"the fact that a third party by his wrong contributed "to the injury does not relieve the defendant from "liability; while the culpable act of a third party may "have been the immediate cause of an injury, an "earlier act of the defendant may have contributed so "effectually to it as to be regarded as the efficient, or "at least concurrent and responsible cause."

That decision states the law on the subject. The earlier act here was the issue of the writ of attachment. Its issue and levy preceded the summons in the common law suit, which was not until October 2nd.

So that the earlier efficient act, *the first blow*, was the attachment and its levy. The contract did not provide for the delivery of logs every day, the effect of not delivering any logs on October 1st, or indeed for that entire month, would not be felt or cause any damage until the three million feet in the boom were sawed up, which took six weeks. As to this, the earlier act was also the attachment and its levy.

A. unlawfully causes B. to be arrested and imprisoned, whereby B. is unable to perform a profitable contract upon which he is engaged. B sues A. to recover damages for such arrest and imprisonment. A. answers and says to B.: You have no right to have that question tried, because at the same time I caused your arrest, I seized and carried away the material you had on hand which it was necessary for you to have in order to perform your contract, and it is so uncertain whether you could have supplied yourself with other necessary material, if you had not been arrested, that the jury can not estimate with any certainty how much damages was caused by the arrest.

A. is killed in a railroad accident. His administrator sues the company for damages. The company answers that A. was suffering from asthma or consumption, or a snake-bite, and might have died in a few days if he had not been killed, consequently he

has no right to have his case against the company *tried at all.*

Such reasoning is fallacious.

In Ring vs. Cohoes, 77 N. Y. 83, s. c. 33 Am. Rep. 574, the Court said: "When several proximate causes "contribute to an accident, and each is an efficient "cause, without the operation of which the accident "would not have happened, it may be attributed to all "or any of the causes." (See 8 Am. & Eng. Enc. of Law, 580 (2nd Ed.), on subject of Several Proximate Causes.)

In Hackett vs. Smelsley, 77 Ill. 110, suit was brought by a wife against a liquor seller for selling liquor to her husband, to recover damages for injury to her means of support caused by the selling of the liquor to her husband. Held: "It will not avail "defendant to prove that others sold liquor that may "have contributed to the husband's intoxication."

"If damage has resulted directly from concurrent "wrongful acts, each of these acts may be counted on "as the wrongful cause, and the parties held responsible "either jointly or severally for the injury." (Cooley on Torts, p. 78, and cases cited.)

In Davis vs. Garrett, 6 Bing. 716, the Court said: "Where a loss has actually happened, *it is not suffi-* "*cient for a defendant to establish that the same loss* "*might have happened, but that it must have happened,* "*if the act complained of had not been done.*" (Cited in Cooley on Torts, bottom of p. 71-72.

In Peck vs. Neil, 3 McLean, 22-24, it was held that defendant was liable if his acts contributed to the injury, though a third party's acts also contributed to the same injury.

In other words, the rule is expressed that it is not necessarry to prove that the acts complained of here, the attachments, were the sole cause of the injury.

Lake vs. Milliken, 62 Me. s. c. 16 Am. Rep. 456, and cases cited.

It can not be doubted that the defendant, by the terms of its bond, is bound to pay all the damages that the attachments directly caused. Such is its covenant. It is even broader than that.

In Lake vs. Milliken, *supra*, the Court says: "When the injury is the result of *two concurring* "*causes, one party is not exempt from full liability*, "although another party was equally culpable," and that in any event it was a question for the jury.

In 6 Bing. *supra*, Ch. J. Tindall says: "Defendant "can not apportion his own wrong, and defendant "must establish that the injury must have happened "but for the act complained of."

If all the alleged contributing causes were each approximate causes, "and each being an efficient "cause, without the operation of which the injury "could not have happened," the injury may be attributed to all or any of the causes. (8 Am. & Eng. Enc. of Law (2nd Ed.) pp. 580-581; sub-div. (g) and cases cited.)

But it is obvious that neither the common law suits nor the refusal to deliver logs was an efficient proximate cause, without which the damages would not have happened. It is absurd as a matter of fact, and certainly the Court can not assume as a matter of fact that the asserted contributory causes would have caused the destruction of plaintiff's business, if the attachments had not been issued and levied.

The following are cases where it was held that contributing causes do not defeat the right to recover full damages for the cause complained of:

Myers vs. Malcolm, 6 Hill 292;

Chacey vs. Fargo, 5 N. Dak. 173.

If these common law suits and refusal to deliver logs had been acts of third parties, it is well settled that such acts would not defeat the recovery for full damages caused by The Atlantic Lumber Company, or its surety, the defendant.

True, the defendant's covenant is to pay the damages caused by the attachment. To hold that where it is obvious the attachment did cause serious damages, and that because other even concurrent causes may have contributed to the same damages, there can be no recovery, would be a denial of justice.

The laws of Florida contemplate and provide for writs of attachment in a pending suit, but the statute requiring the bond does not contemplate, nor is it a fact, that the pendency of the suit itself causes any injury that can be considered to reduce the damages caused by the attachment.

We think the contrary contention was never before made in any State.

In such case, the third parties and The Atlantic Lumber Company would be liable jointly or severally. It is so expressly held in :

Barrett vs. Railroad Company, 45 N. Y. 628;

Webster vs. Railroad Company; 38 N. Y. 260.

In the latter case it was distinctly *held a refusal to charge* that if the acts of a third party contributed to the damages plaintiff could not recover, *is not error.*

That rule of law being applicable to a case of contemporaneous contributory negligence, how much greater is the reason for applying it to the case at bar, *where the acts of The Atlantic Lumber Company were voluntary and deliberate, in suing out the attachments,* and defendant's becoming a surety was also voluntary.

To the same effect is Burrows vs. March Gas. Co. L. R. 5 Exch. 67; Pastene vs. Adams, 49 Cal. 87.

Nothing can be shown in an action on the bond as a defense except the truth of the existence of the grounds upon which it issued.

Lobenstein vs. Hymson, 90 Tenn. 606; s. c. 18 S. W. Rep. 250;

Drummond vs. Stewart, 8 Iowa 341.

The surety is as much responsible as to actual damages for "*setting-a-going*" the proceeding as is the

attaching creditor. (1 Shinn on Attachment, p. 329, citing 49 Mo., p. 25.)

No man or corporation ever went on attachment bonds for $85,000 without being fully advised of the nature of the attaching creditor's claims, and risks taken.

The Supreme Court of Alabama had this subject before it in Louisville Railroad Company vs. Jones (1888), where in a suit by Jones for damages for personal injuries by defendant's negligence, the railroad company set up that plaintiff at the time of the accident *had pneumonia, which contributed to plaintiff's death.* Held: that the company must establish that he *must have* died from the disease, not *may have.*

Id., 3 Sou. Rep., 902-904, and notes, it was also held that it was a question for the jury.

In Beauchamp vs. The Mining Company, 15 N. W. 65 (Mich.), where a similar defense was set up, it was held: that death must be referred to the cause complained of unless it be shown that death must have resulted if the act complained of had not occurred.

It was for the jury to decide whether the other so-called causes so infected plaintiff's business with disease that it would have ceased to do business if the other injury—the attachments—had not happened.

In Beauchamp vs. Saginaw Company, 15 N. W. Rep., 65 (Mich.), the Supreme Court of Michigan quoted approvingly from Baltimore Railroad vs. Reaney, 41 Md., 117, as follows:

"But it is equally true that no wrong-doer ought "to be allowed to apportion or qualify his wrong, and "that as a loss has actually happened while his own "wrongful act was in force and operation, he cannot "be permitted to set up as a defense that there was a "*more immediate cause of the loss,* if that cause was "in operation by his own wrongful act. To entitle "such a party to exemption, he must show not only "that the same loss might have happened, but that it

"must have happened if the act complained of had not "been done." (Citing Davis vs. Garrett, 6 Bing., 716.)

The Supreme Court of Michigan further said in that case:

"If the injury received and the sickness following "concurred in and contributed to the attack of pneu- "monia, the defendant must be held responsible there- "for. It cannot be said that there was a wrongful "second act or a disease wholly independent of the "first wrong which caused the death of the boy." (Citing People vs. Cook, 39 Mich., 239.)

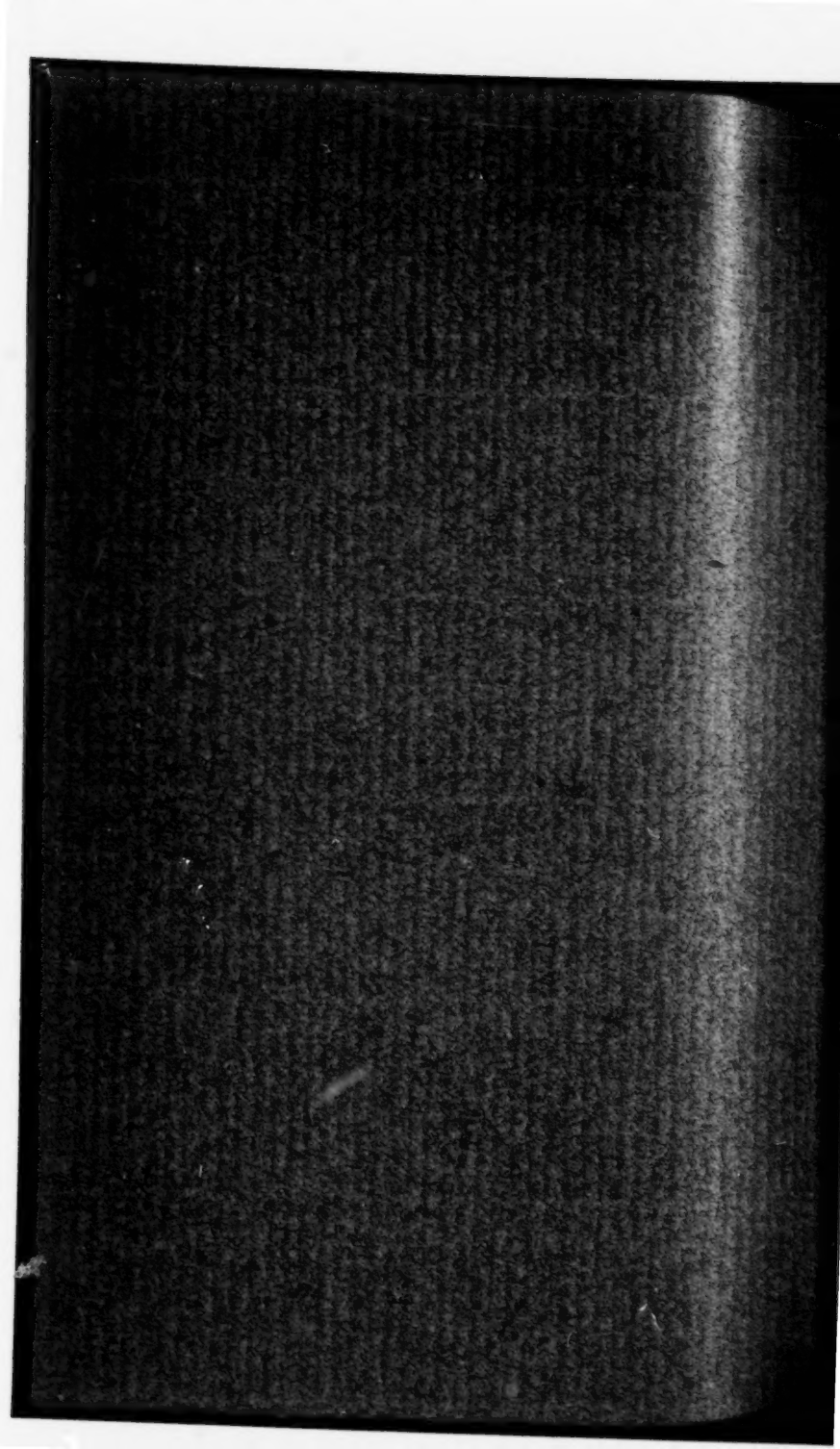
To like effect is Railroad Company vs. Kemp, 43 Am. Rep., 134 (Md.)

Now, we submit that the question whether one would have died from pneumonia if he had not been injured in an accident is more replete with uncertainties, and a more difficult question for a jury to decide, than whether plaintiff, with the property and assets it owned and credit it enjoyed prior to the attachment, it being then a going and flourishing concern, would have been able to obtain a full or partial supply of logs and continued in businesss.

For the above reasons, and those stated in the Petition, it is submitted that the Court should allow the petitioner to assign errors claimed to be to its prejudice.

H. BISBEE,
GEORGE C. BEDELL,
For Petitioner.

SUPREME COURT
OF THE
UNITED STATES



In the Supreme Court of the United States.

Fidelity & Deposit Company of Maryland, Plaintiff in Error,

vs.

L. Bucki & Son Lumber Company, Defendant in Error.

No. 513.

Comes now the defendant in error, L. Bucki & Son Lumber Company, by H. Bisbee and George C. Bedell, its attorneys, and moves the Court for leave to file assignments of error upon the ruling and judgment of the United States Circuit Court of Appeals for the Fifth Circuit rendered upon the transcript of the record and proceedings in the Circuit Court of the United States for the Southern District of Florida in a certain cause therein lately pending wherein this moveant was plaintiff and the Fidelity & Deposit Company of Maryland was defendant, which said transcript was brought to the said Circuit Court of Appeals by writ of error prosecuted by this moveant, on the grounds following, to-wit:

First. This Honorable Court has recently,

to-wit: on the 20th day of January, 1902, on a petition of said Fidelity & Deposit Company of Maryland for certiorari, complaining of alleged error in a single ruling of the said Circuit Court of Appeals on an assignment of error by this moveant, granted a writ of certiorari to said Circuit Court of Appeals to bring before this Honorable Court the above mentioned transcript, and a transcript of the record of the proceedings of said Circuit Court of Appeals thereon, and also a transcript of the record brought to said Circuit Court of Appeals by a writ of error prosecuted by said Fidelity & Deposit Company of Maryland, with a transcript of the record of proceedings in said Circuit Court of Appeals thereon. Both of said writs of error were from the same judgment of the Circuit Court of the United States for the Southern District of Florida, and the interests of justice require that this Honorable Court should, in the review of the decision and judgment of the said Circuit Court of Appeals, have before it and consider the errors assigned by both parties upon the rulings and judgment of the trial court. The rulings complained of by both parties in the Circuit Court of Appeals, as aforesaid, were largely contained in certain instructions to the jury upon the elements of damages recoverable upon attachment bonds conditioned to pay "all damages the defendant may sustain in consequence of the plaintiff's improperly suing out certain attachments,"

and are consequently of great public interest and importance.

This motion is urged for the purpose of bringing before this Honorable Court said rulings complained of by this moveant, should this Honorable Court consider that as the record upon its writ of error by the said Circuit Court of Appeals has already been brought before this Court upon the writ of certiorari heretofore granted, its petition for certiorari should not be granted.

BISBEE & BEDELL,

Attorneys for L. Bucki & Son Lumber Company.

Notice.

The attorneys for Fidelity & Deposit Company of Maryland, defendant in said cause, are hereby notified that the foregoing motion will be made on Monday, the 3d day of February, 1902, or as soon thereafter as the said motion can be submitted.

BISBEE & BEDELL,

Attorneys for L. Bucki & Son Lumber Company.

Service of the foregoing notice and motion accepted.

R. H. LIGGETT,

Attorney for Fidelity & Deposit Company of Maryland.

Brief in Support of Motion for Leave to File Assignments of Error.

This is a motion by plaintiff in the trial court for leave to file assignments of error in a cause brought here by defendant in the trial court by certiorari.

In *Hubbard vs. Tod*, 171 U. S., 474, 494, this Court, speaking through the Chief Justice, said: "And as respondents did not apply for certiorari, we shall confine our consideration of the case to the examination of errors assigned by petitioner."

The certiorari granted in the case at bar (on January 20, 1902) was upon a petition alleging error in a ruling of the Circuit Court of Appeals upon an assignment laid by this moveant upon its writ of error. This moveant, with a view to compliance with the requirement of the Court in *Hubbard vs. Tod*, *supra*, herewith submits its petition for certiorari, but inasmuch as in the case at bar, there is already before the Court, upon certiorari granted at the instance of the other party, the very record sought by said petition, the proceeding by certiorari would seem in this case to be a cumbrous means of getting before the Court the questions raised by this moveant in the Circuit Court of Appeals, and this motion is urged as

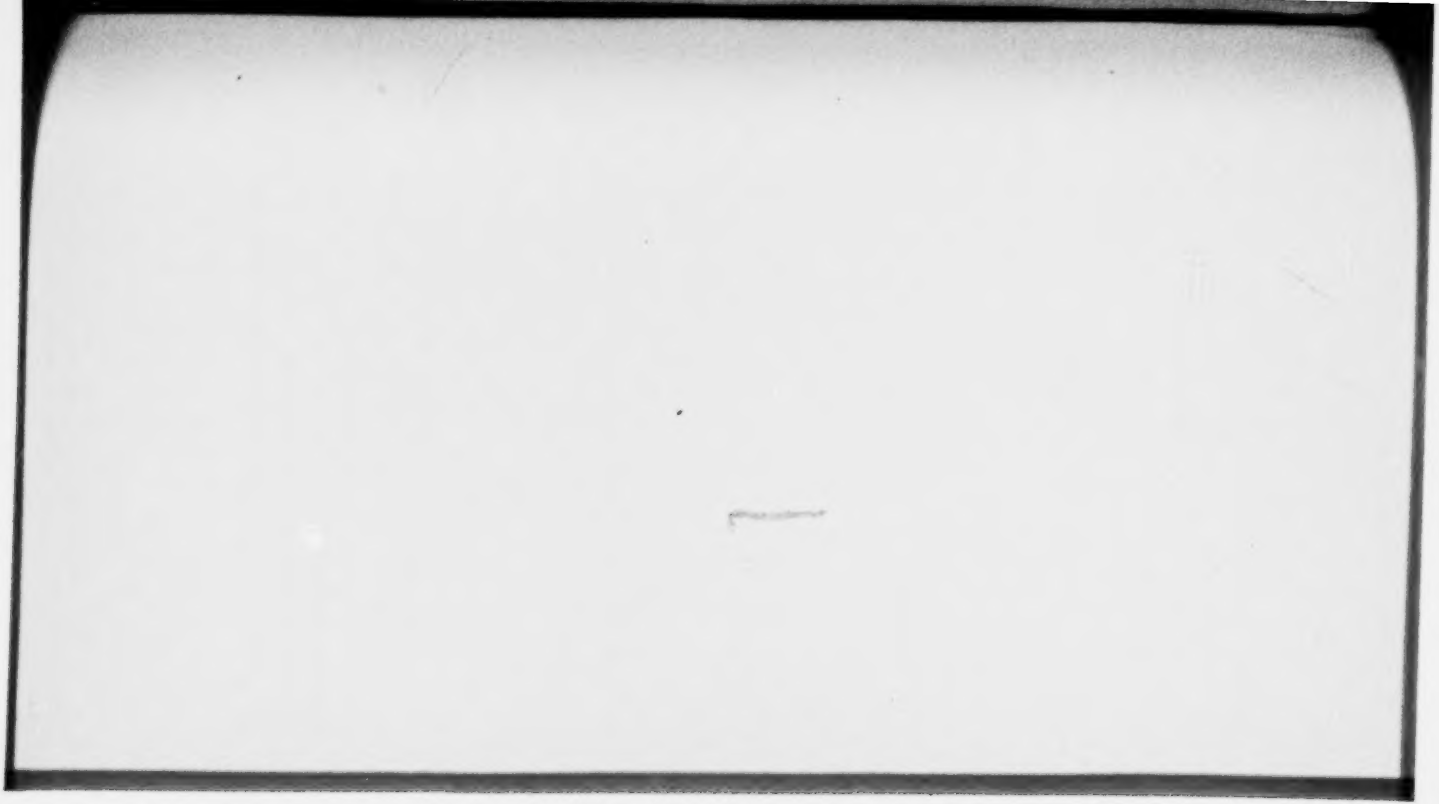
a substitute therefor, should the Court, upon consideration, deem said petition ill advised.

The Court, by its writ of certiorari, has called not only for the record upon which the supposed error of the Court of Appeals happened, but also for the record on the writ prosecuted by the other party, defendant in the trial court, thereby indicating a purpose to review the supposed errors assigned by said defendant in the Court of Appeals; and this moveant respectfully submits that it is but fair and proper that if a question raised below by one of its assignments, and a ruling upon all of its opponent's assignments are to be reviewed, this Court should also review the other questions raised by this moveant in the Court of Appeals.

Those questions are of importance, involving the measure of damages upon an attachment bond conditioned "to pay all costs and damages which the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment," the learned trial court having held the plaintiff to a strict measure of damages and limiting its recovery to damages actually sustained by the detention of its property, and declining to permit the jury to consider damages by the breaking up and destruction of its business, as not in contemplation of the obligors at the time of the making of the bond. The nature of those questions is more fully disclosed by the brief

in support of this moveant's petition for certiorari herewith submitted, to which reference is prayed.

H. BISBEE,
GEORGE C. BEDELL,
Attorneys for Moveant.



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In the Supreme Court of the United States

Office Supreme Court U. S.
FILED
MAR 9 1903
JAMES H. McKENNEY,
Clerk.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Petitioner,

vs.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Circuit Court.

No. 220.
October Term
1902.

Brief of the L. Bucki & Son Lumber Company on its Own Assignments of Error, and on those assigned by the Petitioner.

H. BISBEE,
GEORGE C. BEDELL,
Of Counsel for L. Bucki & Son Lumber Co.

25705

In the Supreme Court of the United States.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Petitioner,

vs.

L. BUCKI & SON LUMBER COMPANY, Plaintiff in Circuit Court.

No. 220.

October Term 1902.

Brief of the L. Bucki & Son Lumber Company on its Own Assignments of Error, and on those assigned by the Petitioner.

STATEMENT.

This is an action at law upon two attachment bonds. The business relations existing between The Atlantic Lumber Company, the attaching creditor, and the L. Bucki & Son Lumber Company, the Plaintiff in the Circuit Court, and which will be called the plaintiff here, were those of vendor and vendee, of hard pine logs; and the plaintiff was a manufacturer of hard pine lumber.

On the 1st day of October, A. D. 1897, The Atlantic Lumber Company commenced an action at law against the Plaintiff in Error, to recover an alleged balance of $8,609.78, on account of the contract price of pine logs sold and delivered by it to the said plaintiff, and on said day caused a writ of attachment to be issued for $9,980.80.

and levied upon the lumber of the Plaintiff to the amount of about 1,250,000 feet. The petitioner was a surety upon the bond required by the Statutes of Florida to be filed before such writ of attachment could issue. Said action was commenced in, and said writ issued from, the Circuit Court of Duval County, State of Florida, and was duly removed into the Court below. Such proceedings were had therein that, on motion of said plaintiff, defendant in the attachment proceeding, the writ of attachment was dissolved on the face of the papers, and on issues of law, on the 1st day of November, 1897.

On the eleventh day of October, aforesaid plaintiff delivered to the Sheriff of Duval County, Florida, a forthcoming bond for such lumber, in accordance with Section 1652 of the Revised Statutes of Florida, and thereby the plaintiff acquired possession of such lumber as *bailee* of the said sheriff. (Rec. 72.)

On October 1st, aforesaid, the said The Atlantic Lumber Company commenced another action at law against plaintiff, to recover a large amount of unliquidated damages claimed for an alleged breach of the contract under which said company was delivering pine logs to plaintiff, and in that action, on the same day, caused a writ of attachment to be issued for $75,000, and levied upon 3,500,000 feet of timber and lumber and 3,000,000 feet of logs in boom; all of plaintiff's saw-mill plant; planing mills and dry kiln plants, for a more particular description of all of which properties levied on under said writs reference is here made to the return of the sheriff on said writs. (Rec. pp 55, 56.)

The said action was commenced in, and the said writ issued from, the Circuit Court of Duval County, Florida, and was duly removed into the Court below. The petitioner, hereafter called the defendant, was surety on

the bond required by said statute before such attachment could issue.

On the 4th day of November, 1897, plaintiff delivered to the sheriff a forthcoming bond in accordance with said section of the Revised Statutes of Florida, and thereby acquired the possession as *bailee* for the sheriff of all the personal property levied on under the said writ.

Such proceedings were had in said action that, on motion of the said plaintiff on issues of fact, tried by the Court, by consent of parties waiving a jury, the said writ of attachment was, on the 14th day of February, 1898, dissolved by the judgment of said Court, and the property ordered to be delivered to plaintiff.

That thereupon The Atlantic Lumber Company sued out a writ of error from the Court of Appeals to review said judgment, and gave a bond, which operated as a supersedeas in point of fact and preserved the lien of said attachment. And in said action a final judgment on the merits was rendered against the said Atlantic Lumber Company on the 7th day of May, A. D. 1898; and the said Company sued out a writ of error from the Court of Appeals to review said judgment gave a bond, which together with a special order of said Circuit Court operated in point of fact as a supersedeas, and thereby preserved and continued the lien of the said writ of attachment upon all the properties so levied upon.

On the 3d day of January, 1899, the Court of Appeals dismissed the writ of error to review the judgment dissolving said attachment, on the ground that it was issued in a suit still pending on the merits and was not a final judgment, and on the same day this Court affirmed said judgment upon the merits, whereupon the said Atlantic Lumber Company applied for a rehearing, which was denied. Said Company then moved to reverse said judgment, with directions to remand said action to the State Court, on the pretense that the Federal Court had no jurisdiction, which motion was denied.

Thereupon The Atlantic Lumber Company applied to the Supreme Court for a writ of certiorari, which was denied about the last of May, 1899. (Rec. p.70.)

On the 9th day of October, 1897, the plaintiff delivered an indemnity bond to said sheriff, for the purpose of enabling plaintiff to deliver certain lumber to vessels, to indemnify such sheriff against any loss; which bond was accepted for such purpose.

On the 9th day of October, 1897, the plaintiff delivered an indemnity bond to said sheriff, for the purpose of enabling the plaintiff to deliver certain lumber to vessels, to indemnify the sheriff against any loss. (See said bonds, Rec. pp. 73-74.)

All of the said forthcoming bonds and indemnity bonds were given voluntarily, there being no statute of Florida making it the duty of plaintiff to give any such bonds.

The defendant was also surety upon another forthcoming bond, which was in the penal sum of one hundred thousand dollars; and in order to obtain the defendant as surety upon such bond, the plaintiff was obliged to execute, and did execute, and deliver to the defendant as such security, a mortgage upon all its timber, lumber and logs, aggregating over eight million feet, and upon its said mill plants and real estate on which it was located, boom-pens, docks and wharves, conditioned to save the said surety company harmless, and to be cancelled in the event and when said attachment should be finally discharged, and the lien cease to exist. Said mortgage was given on the same day as the said bond. (Rec. p. 74.)

By reason of the said writ of error and application for said writ of certiorari, the said surety company would not consent or agree that the lien of said attachment was

finally dissolved, and would not release and cancel the said mortgage until the early part of June, A. D., 1898. (See the release, Rec. p. 78.)

So that the lien of the said attachment and the said mortgage caused by said attachment remained as an encumbrance upon practically all the properties and assets of the plaintiff until such release was delivered to plaintiff, which was on the 8th day of June, A. D. 1899. (See release, Rec. p. 78, executed in Baltimore, Md.)

On the 11th of October, 1897, ten days after said writs were levied, plaintiff obtained the consent of the sheriff in connection with such indemnity bonds, to allow the plaintiff to operate its saw-mill, and to saw up the three million feet of logs in the boom; *the lien of such attachment to be transferred and levied upon the product of such logs as fast as sawed.*

This was for the purpose of keeping in plaintiff's employ its usual corps of laborers, and to give employment to employees employed by the year, and to have the product of such logs ready for sale and delivery when such attachment lien should cease to exist. Accordingly, said mill was started up and was operated until about the 16th of November, 1897, about six weeks, when all said logs had been cut into timber and lumber, amounting to about three million six hundred thousand feet.

Each of the above writs of attachments was ancillary to a common law action, begun contemporaneously with the issue of such writs. The attachments were dissolved, leaving the common law suits still pending. At the time of issuing these writs, October 1st, 1897, the attaching creditor, The Atlantic Lumber Company, was under contract as vendor, whereby it was bound to deliver every month into the plaintiff's boom, 2,000,000 feet of pine logs, board measure—this being about the total

capacity of plaintiff's plant. Said contract had, on October 1st, aforesaid, *three and a half years* to run; and contemporaneously with these writs, said attaching creditor and vendor refused to deliver any more logs, and did not deliver any after September 30th, 1897.

After the removal of said common law actions into the Federal Court, they were, on motion of defendant therein consolidated, and afterwards tried on their merits in one trial, by the same jury.

Prior to such consolidation, declarations had been filed in each action, and in the action called No. 1 in which the writ of attachment for $9,980.80 was isued, the declaration claimed only a balance on account of log deliveries of $8,609.78. After such consolidation the plaintiff therein abandoned both of said declarations and filed a new one, containing *twelve counts.*

The 8th and 9th counts in such new declaration embraced *two small claims*, amounting to about $1,800, arising out of transactions *other than log deliveries*, on which, on October 4th, 1897, said plaintiff had brought a *third action* , and caused *a third writ* of attachment to issue therein. This third suit was abandoned, and the claims were declared on in said 8th and 9th counts.

The claim set up in the suit No. 2 before consolidation, in which the writ of attachment for $75,000 issued, was based, originally, on the pretext that defendant (the plaintiff in this action on the bond) had breached the said log contract, and that the plaintiff in that action —the vendor— *would have made a profit of* $75,000 *if it had performed the contract for the remaining three and a half years,* by delivering logs for that period. This was set up in counts 3, 4, 5, 6, 7 and 10.

After such consolidation, the plaintiff therein set up a new claim that the inspector of the logs, mutually chosen by the vendor and the vendee, had cheated the vendor

out of a large sum of money, by not measuring correctly the logs delivered during the four and a half prior years. This claim was set up in counts 11 and 12. The 11th count went out on demurrer.

At the trial by a jury on the merits, the defendant (plaintiff here) *recovered a verdict and judgment* on counts 3, 4, 5, 6, 7, 10 and 12, setting up claims for such alleged lost profits, for which the $75,000 attachment issued. On counts 1 and 2, embracing all the common counts, and counts 8 and 9 aforesaid, the plaintiff therein recovered a general verdict and judgment for something over $8,000. [This was $4,000 more than the plaintiff was entitled to,on account of errors of fact and miscalculations of the trial judge, committed in calculating the amount due on pleas of set-off (which the trial judge erroneously refused to submit to the jury), and which error such judge undertook to correct, on a motion for a new trial, by ordering a remittitur. The Court of Appeals, at its last term, on a bill in equity to correct such miscalculations of the trial judge, sustained the bill and adjudicated and ruled that the present plaintiff was entitled to a credit of the $4,000 on the said judgment for over $8,000.] So that the writ of attachment for $75,000 was not only dissolved on the merits, and the writ for $9,980.80 was not only dissolved, but it has been adjudicated that, after adding said 8th and 9th counts, setting up claims for $1,800 which was not any part of the basis of the attachment for $9,980.80, and on which a *third attachment* had been issued, the plaintiff therein was entitled to a judgment for only about $4,000.

The above is a brief but correct history of the common law actions and writs of attachment by the attaching creditor, which resulted in the *utter destruction of the plaintiff's prosperous business, in which, for several years prior to such attachments it had manufactured and sold about* 30,000,000 *feet of lumber per annum.*

PRESENT ACTION

This action was brought on the said attachment bonds on the 25th day of March, 1898, to recover "*all costs and damages sustained by the defendant (plaintiff here) in consequence of the improperly suing out of said writs of attachment*," according to the condition of such bonds and of the statute requiring them. *It was brought in the State Court and removed to the Court below by defendant.* (See Rev. Stat., Sec. 1646.)

By an act passed in 1897, a bond by a surety company is sufficient.

The declaration consists of two counts; each, respectively, sets forth *verbatim* the affidavit upon which the writ was issued, the bond, the writ, a description of the property levied on; alleges that for several years prior to and on the day said writs were levied, plaintiff had been engaged in doing a prosperous business of manufacturing and selling hard pine timber and lumber; that the daily product of its mill was about *one hundred thousand feet;* the interruption, suspension and destruction of its business and credit in consequence of such attachments, costs and attorney's fees, and expenses incurred in preparing for, and on the trial of the motions to dissolve the said attachments, and other damages, and that the damages sustained had not been paid.

PLEAS.

Defendant filed numerous pleas, all of which went out on demurrer, except the plea of *non-damnificatus*, and the issues raised by such plea were the only issues of fact tried by the jury.

MOTION TO STRIKE.

The Court below, on motion of defendant, by its order, struck out from each count of the declaration certain parts thereof, claiming damages for injury to credit and attorneys' fees incurred in consequence of such writs. But on plaintiff's motion afterwards restored such parts of the declaration. (Rec. pp. 19-22; 24-25.)

The Court also struck out from both counts certain words which it refused to restore. (Rec. p. 26. See order of Court, Rec. p. 31.)

VERDICT AND JUDGMENT.

The jury found a general verdict for plaintiff for ten thousand eight hundred and eighty dollars ($10,880), and a special verdict, under instructions by the Court in the words and figures following, to wit:

United States Circuit Court, Southern District of Florida
L. Bucki & Son Lumber Company,
vs.
The Fidelity and Deposit Company,
of Maryland.

We, the jury, find for the plaintiff, and assess its actual damages, exclusive of attorneys' fees, at $10,880. And if the Court be of opinion that, as a matter of law, the plaintiff may recover for such attorneys' fees, we further find for the plaintiff for the amount of $7,500, as a reasonable and just fee for the services proven.

Foreman, WM. MICKLER.

The Court refused to include in its judgment the amount so found for attorneys' fees, and rendered its judgment for the said sum of ten thousand eight hundred

and eighty dollars ($10,880), and to reverse the said judgment, writ of error was prosecuted by plaintiff.

BILL OF EXCEPTIONS.

The bill of exceptions contains so much of the attachment proceedings and pleadings on the merits in said actions as were deemed material to the issues in the action. It contains all the forthcoming and indemnity bonds; the mortgage given by plaintiff; the testimony adduced establishing that the plaintiff owned its said mill plants, costing from $135,000 to $150,000; and had on hand in its yards and on its wharves over eight million feet of manufactured timber, including that cut from the three million feet of logs levied on, the market price of which was not less than *sixty-five thousand dollars; that there was not a lien of any kind upon said plants or properties, or products of its mill; that no suit was pending against the plaintiff when the attachments were levied; and that only one piece of its matured commercial paper was outstanding, and a set-off was claimed to the greater part of that; that plaintiff was doing a prosperous business; that prices of the products of its mills had commenced to advance, and that all the products of its mills were actually sold, or there was an active market for them;* that it had never disposed of any of such product, or of any of its assets, except in the usual course of business; that the total amount of the actual claims The Atlantic Lumber Company asserted against plaintiff did not exceed about eight thousand dollars, against which plaintiff had large set-offs, and its demand even for this was unliquidated.

It was deemed necessary to set forth at some length in the bill of exceptions the testimony upon certain points, for the reason that the Court below refused to submit to the jury numerous questions of fact; and such testimony was essential to establish that there was ample evidence

to go to the jury upon all such questions, and that such refusal was not justified, because there was no evidence. For this reason, the bill of exceptions is not subject to criticism, which might otherwise be just. (Bill of Exceptions, pp. 55 to 136.)

The Court below refused to submit to the jury the question as to how much damages the plaintiff sustained by reason of losses by the interruption and destruction of its business, caused by the attachment, and its refusal was based on the *sole ground that the common law suits claiming large damages might have contributed to such losses if no attachments had been issued, and that the refusal of The Atlantic Lumber Company to deliver any more logs to plaintiff after September 30th, 1897, might also have contributed to such losses, by requiring plaintiff to furnish itself with logs from other sources; and that there was no way the jury could separate the losses or damages which such other alleged contributory causes may have produced.*

The refusal of the Court to submit such question to the jury, completely destroyed and emasculated the plaintiff's main cause of action, and leaves the plaintiff to bear all its losses, resulting from interruption of business, caused by the attachments, on the theory that such alleged contributory causes might have contributed to such losses. This action of the Court is assigned as error, and presents the leading and most important question for review by this Court.

The pages *in brackets*, referred to in this brief, are to the original pages of the Record in the Circuit Court of Appeals.

ARGUMENT.

ASSIGNMENTS OF ERROR.

We repeat all the assignments of error by the plaintiff *on its writ of error* from the Court of Appeals. We insist that the said Appelate Court erred in not ruling each one of said assignments well taken.

The above assignments are numbered 1 to 37, inclusive (Rec. pp. 28 to 45), a few of which will be discussed at length. The most important of these are the 1st, 24th, 30th, and 32d, and are based on *exceptions* taken to the action and proceedings of the trial judge, contained in the bill of exceptions preserved by the plaintiff, and are in the words and figures following, to wit:

"Now comes the defendant, by its attorneys, and *after all the testimony had been taken* by the plaintiff and defendant, moves the Court to exclude from the consideration of the jury the following testimony:

1. All testimony in regard to the profits that the plaintiff's mill had been making prior to October 1st, 1897, on the grounds following:

A. Because loss of profits on the operation of the mill are not a proper element of damages in this case.

B. Because the profits that the plaintiff may have made in the past, are not a proper criterion of what it would have earned in the future.

C. Because the said estimate of $75,000 a month, was stated by the witness who made it to have been based on the "cost of the logs, the cost of the manufacturing and the net result of the sales, the actual sales, deducting one from the other, and taking off the cost of selling," which is an unintelligibe statement, and because the wit-

ness that made it admitted in cross-examination that he did not know what the lumber on hand sold for.

D. Because even if such testimony tended to prove that plaintiff had lost profits by reason of the attachment, such loss would be speculative and too remote as a reason of damages in this case.

2. All the testimony relative to the cost of manufacturing lumber, and the supply of the timber
178 lands and logs, on the grounds following:

A. That such evidence is incompetent, and

B. That loss of profits by reason of the plaintiff's inability to operate its mill after November 16th, 1897, cannot be recovered in this suit, and

C. Because the plaintiff has adduced no testimony to show that it could have gone on with its business after November 16th, 1897, even though no attachment had been levied, and

D. Because the testimony demonstrates conclusively that the plaintiff could not have operated its mill at a profit, even though no attachment had been levied.

3. All testimony in regard to damage to credit and loss of profits as a consequence thereof.

A. Because the plaintiff had adduced no testimony to show that it had any credit prior to October 1st, 1897.

B. Because the plaintiff had not shown that it could have obtained a loan of the funds necessary to carry on its business, even though no attachment had been sued out against it.

C. Because the testimony of the plaintiff shows conclusively that the plaintiff had no credit on October 1st, 1897.

4. All testimony in regard to the salaries and loss of time of the salesmen Murfree and Cohen.

A. Because the evidence fails to show that the said

salesmen could have made any sales during the time the mill was shut down.

B. Because the evidence shows that all the lumber was sold and shipped prior to January 1st, 1898, the time at which the employment of said salesmen terminated.

D. Because the loss of the service of the employees did not result directly from the levy of the writ of attachment.

E. Because it was not shown that the mill would have run had no attachment been levied.

5. All testimony in regard to the salary and loss of time of the secretary, and the New York bookkeeper, on the same grounds lost above, except
174 the first and second, and because it was not shown that said employees were idle, or, if idle, what the value of their lost time was.

6. All the testimony in regard to the salary of the president of the mill, the superintendent and stenographer, and the planing mill superintendent.

A. Because the loss of the services of these officers, if loss there was, did not result directly from the levy of the writ of attachment, and are not proper elements of damages herein.

.B. Because there is no evidence to show that said employees were idle from October 1st to October 10th, 1897.

D. Because the mill manufactured the average monthly quantity of lumber in October, 1897, and it appears that the plaintiff got substantially the same amount of services out of these employees as in other months.

E. Because the mill finally shut down November 16th, 1897, within the year for which these employees were employed, and ten days later than it would have shut down, but for the shut down in October, 1897.

7. All evidence relative to the market price of lumber subsequent to the 6th of February, 1899, because on that day the ownership of the mill property passed out of the possession of the plaintiff.

175 And on consideration of the said motion, the said Court ruled thereon in writing in words and figures following, to wit:

This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, *any damages arising from the consideration of injury to credit or loss of profits would be too remote uncertain and speculative*, it is therefore ordered that this motion be granted *as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all testimony to the damage to credit, loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment.* That in regard to the profits plaintiff's mill had been making prior to October 1st, 1897, be retained and considered *only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment and the motion be denied in all other respects.*

February 1st, 1900. JAMES W. LOCKE, Judge.

And the said trial judge expressed his oral opinion in the words and figures following, to wit:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully satisfied in my own mind that damages from the loss of profits arising from the subsequent or *future business which might possibly have been carried on, is, under the evidence, too remote and speculative for the testimony to go to the jury.* Some Courts have held that every fact should go to the jury to be considered, but the

United States Courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable Court, could view it in but one light, the Court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. *If there was no combination*
176 *of circumstances other than the attachments; had a third party come in and levied an attachment and stopped the business and there had been no suspension save by the attachment, then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common law suits, so changed the circumstances that there is no certainty that there could have been any profits.*

"Every author of authority referred to, even by the plaintiff's attorney, says that there must be some certainty.

"Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that had it not been for the attachments, *money could have been borrowed*, timber land stumpage could have been procured, logs could have been procured profitably; if logs could have been procured *profitably*, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the Court cannot say that there is sufficient to justify the jury in finding, perhaps, large damages against the defendant in this case on account of loss of credit and profit from the levying of the attachments."

To which ruling the plaintiff, by its attorney, then and there and before the jury retired, excepted on the grounds:

1. Because the ruling of the Court invades the plaintiff's constitutional right to trial by jury as to the question whether plaintiff could have continued its business and in the usual course of business if these attachments had not been levied.

2. The theory of the declaration upon which the plaintiff proceeded in the trial of the cause was that the attachments interrupted the business of the
177 plaintiff and caused its interruption for a long period of time, and that the plaintiff was entitled to prove and submit to the jury the question as to the loss of the use of its mill properties in consequence of these attachments. That during the taking of the testimony the Court repeatedly sustained the theory of the plaintiff, and on the objection of the defendant overruled objections of the defendant that testimony was not admissible to prove the past profits of the plaintiff's properties prior to October 1st, 1897, as a basis upon which to estimate the profits the plaintiff lost after October 1st, 1897, as a consequence of these attachments. That the ruling of the Court by the said order and decision has now taken the plaintiff by surprise, for if the Court had excluded the testimony offered by the plaintiff, and by the defendant also, tending to establish the profits the mill made up to October 1st, 1897, for the purposes of estimating the profits that would have been made subsequently if the attachments had not been levied, the plaintiff would have proceeded upon another theory to show other and different damages, which, relying upon the rulings of the Court, the plaintiff did not offer, to wit: testimony, some of which offered and excluded, tending to show the deterioration of the property while the attachments were pending; testimony tending to establish more than by

mere incidental evidence the taxes, costs of repairs, cost of insurance and cost of keeping watchmen, and to have introduced further testimony tending to show the amount of capital invested and *the rental value of the property*, and for these reasons the ruling of the Court has taken plaintiff and his counsel by surprise, and to the plaintiff's prejudice and tends to destroy the right of the plaintiff to a fair trial by jury.

And this constitutes plaintiff's second exception.

And thereupon the plaintiff made and submitted a certain motion in writing, in the words and figures following, to wit:

Comes now the plaintiff by H. Bisbee, his attorney, and moves the Court to discharge the jury in this case, and continue and postpone the trial of the case to some future day of this term on the following grounds:

First. Upon the issues made by the pleadings in this action, the plaintiff entered upon the trial and continued in the trial thereof until the testimony was closed upon the theory and belief that if the plaintiff could prove that on October 1st, 1897, when these attachments were levied, it was then and had been for over four years engaged in an established business of manufacturing and selling yellow pine timber and lumber, and that up to said 1st day of October, its said business was a profitable one; and prove that as a direct consequence of such attachments, the plaintiff's business was broken up, interrupted and destroyed for a period of time as such consequence of said attachments; then one element of plaintiff's damages would be the profits it lost in its said business after October 1st, 1897, in consequence of such attachments. That the Court, over objections of the defendant, repeatedly ruled and held that testimony offered by the plaintiff was admissible and admitted such testimony tending to establish the amount of the profits of such business for

several months prior to October 1st, 1897. That such repeated rulings of the Court led the plaintiff
179 and its counsel to believe, and they did believe that such theory was in law correct, and that the Court would submit such testimony to the jury, to be considered by it in assessing the amount of damages plaintiff had sustained in consequence of such attachments, in connection with the question whether or not the plaintiff would have been financially able to continue its business after October 1st, 1897, during the period of time such attachments were existing and operative. That after the testimony in said action was closed on both sides and before any argument of said cause to the Court or jury, the Court, on the motion of defendant, after argument of such motion, ruled and decided to exclude from the consideration of the jury all such testimony and evidence, and also ruled and decided that the evidence adduced as to the financial ability of the plaintiff on October 1st, 1897, to have continued in business during said period of time if such attachments had not been levied. The Court on said motion also ruled and decided that the question whether or not the said attachments were the direct cause of preventing the plaintiff from continuing in business after October 1st, 1899, for the period aforesaid would not be submitted to the jury for its decision.

By such rulings of the Court on the said motion and after the testimony in the case had been closed, the plaintiff and its attorney have been taken by surprise, to plaintiff's prejudice. That if said testimony of the plaintiff in respect to profits prior to October 1st, 1897, had been excluded when offered, the plaintiff would have and could have adduced other evidence establishing other elements of damages, to wit: loss of profits on timber and lumber to large amount, which such attachments prevented the plaintiff from delivering under contracts

prior to October 1st, 1897, and which by such rulings plaintiff did not consider relevant or material.

Also, but for the reason aforesaid, plaintiff could have adduced evidence establishing the losses it sustained by decay and deterioration of its mill properties, docks and wharves connected with said mill, and costs of repairs, while said mills were idle and not used, in con-
180 sequence of such attachments, and the exact amount of taxes paid, and exact amount paid watchmen while said mill was so idle.

And on the further ground that a party to a suit during the taking of testimony cannot proceed on a certain theory of the law of the case, and after the testimony is adduced, change his position and ask instructions on another theory, to his adversary's prejudice, and what a party to the said suit cannot do, the Court itself cannot do to the prejudice of a litigant.

Which said motion the said Court denied upon the grounds that the plaintiff's counsel had had ample notice from the pleadings in the case that such testimony, relating to the damage to credit and loss of future profits, was only permitted to be introduced to determine how far it could prove certain and direct damages as the reasonably necessary result of the levying of the attachments, and that unless such damage was shown to be the direct and certain result from such cause, the Court would order it withdrawn from the jury.

That the case stood for a long time upon the order striking certain matters of damages from the declaration and it was only admitted upon the urgent application and argument of the plaintiff's counsel that it was impossible to determine until the testimony was heard, how positive and certain such damages might be shown to have been the direct result of the levy of the attachments and to the denial of such motion the plaintiff then and there and before the jury retired, excepted, for the reasons and

grounds stated in the said motion, and this constitutes the plaintiff's third exception.

And during the argument by plaintiff to the jury, by its counsel, the latter said:

I don't know how to argue it in, your Honor. You permit me to consider the evidence as to previous profits of the mill up to October 1st, for some purpose; what purpose, I dont know.

To which the Court replied: To show the damage suffered while the property was in the custody of the sheriff under the attachment. The evidence shows it was released on the 11th of October.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

"It is a question of fact for you to determine whether or not if these attachments had not been issued and levied,
the plaintiff would have been able to supply
181 its mills with logs after such attachments and
to what extent plaintiff would have been able to supply its mill with logs and continued in its business, and the amount of profit it would have made in such business in case said attachments had not been issued, provided you believe from the evidence that the direct consequence of such attachment caused the plaintiff to cease continuing in business, and that plaintiff would have and could have continued in business if such attachments had not been issued and levied and continued upon plaintiff's properties."

And the Court refused to give such instruction to the jury and to the refusal of the Court to give said instruction, the plaintiff then and there, and before the jury retired, excepted, on the grounds,

1st. That by such refusal the plaintiff was deprived of the right to have a material question of fact tried by jury.

2d. Because there was ample evidence upon which to submit such question of fact.

3d. Because the said instruction embodied a correct principle of law, applicable to the facts and evidence adduced in the case.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

The question whether or not the plaintiff was deprived of the means and financial ability to supply itself with logs for its mill and continue in business after October 1st, 1897, as a direct consequence of the issuing and levying of these attachments is one for the jury to decide.

Whether or not the plaintiff would have been financially able to continue in its usual business after October 1st, 1897, if these attachments had not been levied is a question of fact for the jury to decide upon a consideration of all the evidence in the case.

Which instructions the Court refused to give, and to the refusal of the Court to give said instruc-
182 tions, plaintiff then and there, before the jury retired, excepted on the grounds that such instruction presented and embodied correct rules of law, and requested the submission to the jury of material questions of fact.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

If you believe from the evidence that the issuing and levying of these writs of attachment injured and impaired the credit or financial standing as it existed on October 1st, 1897, then the plaintiff is entitled to recover such damages for injury to its credit as you find from the evidence the plaintiff sustained as a direct consequence

of the issuing and levying of such writs upon the property of the plaintiff.

And the Court refused to give said instructions to the jury, and to the decision of the Court refusing to give such instructions to the jury, the plaintiff then and there, before the jury retired, excepted, on the grounds, first, that there was ample grounds upon which to properly submit such instructions to the jury.

2d. That such instructions embodied a correct proposition of law, applicable to the facts of the case.

3d. Because said instructions presented a material question of fact.

And the testimony being as hereinbefore set forth in the bill of exceptions, the Court was requested to instruct the jury as follows, to wit:

On the subject of the financial condition of the plaintiff with respect to its ability and means of continuing in its business after October 1st, 1897, you must understand that the question to determine in [is] not the opinion that any officer of the Atlantic Lumber Company entertained of the financial condition of the plain-
183 tiff, nor is it the question of the opinion entertained by any particular bank or other business house as to the plaintiff's financial standing, especially as if difference or controversies arise between them.

The real question before you is, what was the general financial condition of the plaintiff on October 1st, 1897, in respect to its ability and means of continuing in business, if these attachments had not been levied, and in reaching a conclusion on this subject, it is your duty to give weight to and consider the amount and value of all its property, its mill plant, lumber, timber and logs on

hand and good outstanding claims against third parties, and the amount of its liabilities due and not due on October 1st. You should also consider its business connections with those engaged in the lumber business, the good will of those engaged in such businesses, and its facilities for doing business, finding a market for the product of its mills, and of supplying itself with logs for its mills.

You have heard the testimony as to the available round timber or logs on and after October 1st, 1897, and from its evidence, applying your common sense to the subject, you will conclude whether or not it is reasonably probable or certain that the plaintiff with such means as it had at its command would have been able to have supplied its mill with logs during the time attachments rested on plaintiff's property, if these attachments had not been levied, whether what one has done, another with equal means and skill can do, is not a question of science or law, but one of fact for you to decide.

Which instruction the Court refused to give, to which refusal the plaintiff then and there, before the jury retired, excepted on the ground that it presented correct rules of law, applicable to the case and upon material questions of fact to be decided by the jury, and said instructions were necessary to aid the jury to properly understand the questions to be decided.

There has never been any pretense that said assignments of error are not in every way a full compliance with the rule of the Court on that subject.

Said exceptions and assignments are errors by the trial judge and Court of Appeals, upon the following important points, to wit:

1st. For granting, in part, the defendant's said motion to exclude certain testimony whereby the trial

judge refused to submit to the jury damages caused by the attachments.

2d. For refusing to grant plaintiff's motion for a continuance of the action, after granting defendant's said motion to exclude testimony, on the ground that the excluding of such testimony took plaintiff by surprise, after admitting such testimony over the repeated objections of the defendant, and deprived plaintiff of an opportunity of proving other legal damages, which it would have proved if the evidence of loss of the use of its mill plant had been excluded when offered.

FIRST OF ABOVE THREE POINTS, AND ARGUMENT THEREON.

Referring to defendant's motion to exclude testimony, the order of the Court thereon and *the reasons given by the judge for such order*, as set forth above, and found in the Record (pp. 96 to 100 and 111 to 113), it will appear that the Court based its ruling upon the ground that there were *three contemporaneous causes which contributed to the suspension of the plaintiff's business.* These causes were,

A. The *refusal* of the attaching creditor, *in its capacity as a vendor of logs*, to deliver any more logs after such creditor took out the attachments.

B. *The bringing of the two common law actions* by the attaching creditor, claiming heavy damages, *in which the attachments were ancillary.*

C. The suing out these writs of attachment.

The said reasons and contributary causes, as stated by the trial judge when he granted said motion, are in part in the following words, to wit: "If there was no combination of circumstances, other than the attachments,

had a third party come in and levied an attachment and stopped the business, and there had been no suspension (of the business), save by the attachments then there might have been such testimony as would prove a loss of profits; but in this case, the particular circumstances, *the suspension of the contract for the delivery of logs and the bringing of the common law suits so changed the circumstances that there is no certainty that there could have been any profit*" * * * the Court can not say that there is sufficient [evidence] *to justify a jury in finding, perhaps, large damages against the defendant in this case, on account of the loss of credit and profit from the levying of the attachments.*" Rec. pp. 98-99.

This language of the Court is not equivocal or doubtful in its meaning, though not very happily expressed. But taken in connection with the instructions refused, the reason operating in the mind of the Court for refusing to submit to the jury the damages for profits lost by being deprived of the use of the mills, *was that the jury could not separate, in dollars and cents, the amount of damages caused by the writs from the damages assumed to have been caused by the common law actions, and refusal to deliver any more logs.*

If there were doubt as to what the Court meant, it is set at rest in its instructions to the jury of its own motion in the following language, to wit:

The testimony being as hereinbefore set forth in the bill of exceptions, the Court instructed the jury, of its own motion, in the words and figures following, to wit:

"All these questions that have come up in regard to the damages; all this testimony that has come in to awaken your sympathies in behalf of one or the other, is not for you to consider; the only question is a clear-cut question; it is, how much damages did the Bucki Compa-

ny suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. *At the time the writs of attachment were levied, there were two common law suits commenced, both of which have been terminated. That is one attending circumstance. The other is, that The Atlantic Lumber Company cancelled its contract or considered it cancelled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs, and the common law suits, unite in being the cause for subsequent suffering of damage by the Bucki Company.*

"The law is distinct, that where a party sets in motion a wrong, an intervening wrong will not prevent the party instituting or setting in force that wrong, from being liable for all damages which can be directly traced to that.

"But in this case, the attachment did not cause the stopping of the furnishing of logs, nor did the issuing of the attachment cause the institution of the
196 common law suits. I therefore say that it is difficult for you to determine how much damage the Bucki Company suffered by reason of the issuing of the attachments; not how much they suffered by reason of all the attending circumstances, but how much they suffered by reason of the issuing of the attachments.

"If there is any question upon which the Court considers a verdict would not be justified and any way it might be viewed, then it is the duty of the Court to withdraw from the jury that question.

"As I say, that law is that all the damages that can be awarded against a surety on the bond where there is no malice alleged, where a party becomes merely responsible for the direct damages that have been caused, the damages must be strict and positive.

"Taking into consideration the several causes, contemporaneous, tending to interfere with the business of the Bucki Company, tending to injure their credit or break up their business, I was satisfied from the evidence that there could be no positive, certain or direct damages which could be charged to the issue of the attachments as separate and distinct from the other causes in the case.

"I have therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all the profits the Bucki Lumber Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit. As I say, there was so much uncertainty, that there was no certainty under the law for determining what damages have been suffered by the party in his case.

"I therefore instruct you, gentlemen, that the *damages must be confined to the damages suffered by the detention of the mill for the time being. Those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff.*"

Rec. 111.

Note—The last part of the above quoted instruction to the jury, to wit: *"The detention and taking of the property from the possesion of the plaintiff,"* refers to the period of time between October 1st and October 11th, 1897, *when the sheriff held all the logs in the boom, thus preventing plaintiff from sawing any of such logs.* This is also shown by the last part of the rules on the motion to exclude testimony, as follows: *"That evidence in regard to the profits* plaintiff's mill had been making prior to October 1st, 1897, *be retained and considered only for the purpose of determining the actual damages suffered*

during the time the operation of the mill was suspended on account of the attachments, and the motion be denied in all other respects."

Rec. p. 98.

This is further shown by the following, appearing in the bill of exceptions, to wit: * * and during the argument by plaintiff to the jury by its counsel, the latter said: "I don't know to argue it, your Honor. You permit me to consider the evidence as to previous profits of the mill up to October 1st *for some purpose, what purpose, I don't know.*" To which the Court replied: *"To show the damages suffered while the property was in the custody of the sheriff under the attachment.* The evidence shows it was *released* on the 11th day of October. (Rec. p. 102.) [The word "property" above refers to logs in the boom. The word "released" refers to the agreement with he sheriff, whereby plaintiff could saw the logs in the boom, and the lien of the writs be transferred to the manufactured product from the logs.] If the matter in the above note were not true, and *intended as a restriction to prior to October 11th* then the above *rulings of he Court against the plaintiff would be irreconcilably inconsistent* with the following rulings in its favor (to which defendant excepted and assigned error on its writ of error), to cover the time between October 1st and 11th, to wit: "One of the principal points in this action is as follows:

"The plaintiff claims that it should be compensated for the loss of the use of its mill properties caused by these atachments. The defendant claims that the plaintiff is not entitled to be compensated for the loss of the use of its mill properties while the liens of the attachments were upon them, because, as the defendant asserts, the plaintiff was in such financial condition that it could not have continued in business even if the attachments had not been issued and levied.

"This is a question of fact for you to determine upon all the evidence in the case, and if you believe from all the evidence in the case that if these attachments had not been issued and levied upon the plaintiff's properties it, the plaintiff, would have been able to continue in business, then you will find against the defendant on this contention, and award to the plaintiff such an amount of damages as upon the evidence you feel convinced the plaintiff sustained as a direct and proximate consequence of these attachments." (Rec. on Defendant's Writ, p.36.)

Rec. p. 174.

And the judgment would have to be reversed on the sole ground of such inconsistent instructions.

The above instructions, last quoted, in favor of plaintiff, taken in connection with the language of the Court quoted in the above Note, *is conclusive that the trial judge did not for a moment consider the evidence from the books, and otherwise as to prior profits,* too uncertain upon which to estimate future profits lost, after October 11th, for the trial judge certainly did submit such evidence as to the damages by the loss of profits between October 1st and the 11th, during which period plaintiff could not saw any logs, because the sheriff had them in possesion, and ruled as to *such period of time that such damages were not too remote.*

THE PROPOSITION STATED.

The Court, then, has squarely before it the proposition was it or not error to refuse to submit to the jury the damages for the loss of the use of the mill after October 11th, *because* the jury could not determine to what extent the effect of the writs caused such loss, *separate and apart from the effect of non-delivery of logs*, and the common law actions.

The attaching creditor *was the author of the three* [asserted by the judge] contributory causes. These *asserted* three causes were in their origin contemporaneous, and operated from the same identical time., except that the Record shows that the *writs of attachments were issued and served* at 6:25 p.m. October 1st, while the summonses in the common law actions, while issued October 1st, were not served until October 2d.

Rec. p. 47.

The trial judge *assumed* that non-delivery of logs by the attaching creditor, and its common law suits, contributed to interrupting plaintiff's business, and that as the defendant surety company *was only bound to pay the damages caused by the writs of attachment*, it was not possible for the jury to separate the damages caused by the writs from the damages caused by the other two contributory causes. Therefore *the plaintiff has no remedy and must bear all the damages, and was not entitled to a jury trial of the issue involved.*

One of the fallacies of the said ruling consists in this: that plaintiff at least had the right to have submitted to the jury the question whether, *if these writs had not been issued*, the non-delivery of logs by the creditor and vendor and its common law actions would have caused any appreciable damage at all. The Court's *assumption* that they would have caused appreciable damage if the writs had not issued, was *erroneous. It was a question of fact for the jury to decide.* If the jury found that such other asserted contributory causes would not have caused any appreciable damage if the writs had not been issued, then there was not the difficulty *assumed* by the Court, of assessing all the damages caused by the writs. It was for the jury to decide *the length of time*, if any, that the plaintiff would have lost the use of its mill for want of logs, after the attaching creditor and vendor refused to deliver any more logs, before it could have obtained an

entire or *partial supply of logs* from other sources. *All these were questions of fact.* It was an absurdity for the Court to assume that the non-delivery of logs by this creditor and its common law action must have positively interrupted the plaintiff's business if there had been no attachments. Logs were the only things *needed* by plaintiff to enable it to continue business, and the other two causes did not, *necessarily*, disable plaintiff to obtain them.

This ruling of the Court below *was not in response to the motion to exclude testimony.* That motion did not ask any such ruling. It was based on the defendant's theory that the damages were too remote. The ruling was not moved for by either party, not argued by either party, and was taken by the Court of its own motion, with no opportunity to argue it and with little, if any, consideration

ANOTHER GROUND.

The ruling was erroneous on other grounds.

It was not pretended that either of the other two assumed causes of damages *were intervening causes*, and where there are two or more joint trespasses or two or more joint contemporaneous authors of a damage, *each of them is liable* for all the damages, and the injured party may sue one or all.

The defendant company cannot be in a better position than it would have been if the attaching creditor had sued out these writs, and one, "S." had refused to deliver the logs and one, "J.," had brought the common law suits, all on the same day and at the same hour.

In that event, *in the eyes of the law, as a practical science, and from the necessity of the case*, the author of the writs would be liable to all the damages, because in the contemplation of the law, *so far as the remedy is concerned, the writs caused all the damages*, and the surety

company is liable, because it was bound by the terms of its bond to pay all damages in consequence of the writs. Upon this principle, the surety, under his covenant, is liable for all the damages, and the law, *in the interest of, and to promote justice, will not permit the surety to say that other contemporaneous causes may have contributed to the damages.*

Otherwise, there would be a failure of justice, and the plaintiff must bear all the injury unredressed, though obviously very great.

To permit it to do so, on the ground that such damages are not within the condition of its bond, would be giving force and effect to reasoning too refined for social conduct, and an outrage on the plaintiff's rights. The argument of the Court below was: "The surety only agreed to pay damages caused by the writs; as the other two causes *may have contributed to the same damages, the surety is wholly discharged from the bond as to such damages.*" We submit, there is no precedent for such a ruling and it is not founded in reason.

We have found no case exactly like this, on the point in hand, but decided cases on questions closely allied to it, furnish ample authority for plaintiff's contention.

THE PROPOSITION.

Where defendant sets up that from another cause the injury may have happened, *he must allege and prove that the injury must have happened if the act complained of had not occurred*, and to establish that it *may* have happened is not sufficient.

Davis vs. Garrett, 6 Bing. 716, by Chief Justice Tindall, a case which has been followed in this country.

"When the injury proceeds from two causes operating together, the party putting in motion one of them is liable

the same as though it was the sole cause. This is one form of a universal principle in the law that he who contributes to a wrong, either civil or criminal, is answerable as doer."

Bishop's Non-Contract Law, Sec. 39.

In *Grimes vs. Bowerman*, 92 Mich. 258, s. c. 53 N. W. Rep. 751, which was an attachment case, the Court, in the syllabus, said:

"Where the plaintiff has been injured in his person or property by the wrongful act of the defendant, the fact that a third party by his wrong contributed to the injury does not relieve the defendant from liability, while the culpable act of a third party may have been the immediate cause of an injury, an earlier act of the defendant may have contributed so effectually to it as to be regarded as the efficient, or at least concurrent and responsible cause."

That decision states the law on the subject. The earlier act here was the issue of the writ of attachment. *Its issue and levy preceded* the summons in the common law suit, which was not until October 2d.

So that the earlier efficient act, *the first blow*, was the attachment and its levy. The contract did not provide for the delivery of logs every day, the effect of not delivering any logs on October 1st, or indeed for that entire month, would not be felt or cause any damage until the three million feet in the boom were sawed up, *which took six weeks*. As to this, the earlier act was also the attachment and levy.

A. unlawfully causes B. to be arrested and imprisoned, whereby B. is unable to perform a profitable contract upon which he is engaged. B. sues A. to recover damages for such arrest and imprisonment. A. answers and says to B.: You have no right to have that question

tried, because at the same time I caused your arrest, I seized and carried away the material you had on hand which it was necessary for you to have in order to perform your contract, and it is so uncertain whether you could have supplied yourself with other necessary material, if you had not been arrested, that the jury cannot estimate with any certainty how much damages was caused by the arrest.

A. is killed in a railroad accident. His administrator sues the company for damages. The company answers that A. was suffering from asthma or consumption, or a snake-bite, and might have died in a few days if he had not been killed, consequently he has no right to have his case against the company *tried at all.*

Such reasoning is fallacious.

In *Ring vs. Cohoes,* 77 N. Y. 83, s. c. 33 Am. Rep. 574, the Court said: "When several proximate causes contribute to an accident, *and each is an efficient cause, without the operation of which the accident would not have happened, it may be attributed to all or any of the causes.*" (See 8 Am. & Eng. Enc. of Law, 580,, 2d Ed., on subject of Several Proximate Causes.)

In *Hackett vs. Smelsley,* 77 Ill., 110, suit was brought by a wife against a liquor seller for selling liquor to her husband, to recover damages for injury to her means of support, caused by the selling of the liquor to her husband Held: "It will not avail defendant to prove that others sold liquor that may have contributed to the husbad's intoxication."

"If damage has resulted directly from concurrent wrongful acts, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally for the injury." (Cooley on Torts, p. 78, and cases cited.)

In *Davis vs. Garrett*, 6 Bing. ¶16, the Court said: "Where a loss has actually happened, *it is not sufficient for a defendant to establish that the same loss might have happened, but that it must have happened, if the act complained of had not been done.*" (Cited in Cooley on Torts, bottom of p.71-72.)

In *Peck vs. Neil*, 3 McLean, 22-24, it was held that defendant was liable if his acts contributed to the injury, though a third party's acts also contributed to the same injury.

In other words, the rule is expressed that it is not necessary to prove that the acts complained of here, the attachments, were the sole cause of the injury.

Lake vs. Milliken 62 Me. s. c. 16 Am. Rep. 456, and cases cited.

It cannot be doubted that the defendant, by the terms of its bond, is bound to pay all the damages that the attachments directly caused. Such is its covenant. It is even broader than that.

In *Lake vs. Milliken*, supra, the Court sais: "When the injury is the result of *two concurring causes, one party is not exempt from full liability*, although another party was equally culpable," and *that in any event it was a question for the jury.*

In 6 Bing., supra, Chief Justice Tindall says: "Defendant cannot apportion his own wrong, and defendant must establish that the injury must have happened but for the act complained of."

If all the alleged contributing causes were each approximate causes, "and each being an efficient cause, without the operation of which the injury could not have happened," the injury may be attributed to all or any of the causes. (8 Am. & Eng. Enc. of Law, 2d Ed., pp. 580-581; sub-div. (g) and cases cited.)

But it is obvious that neither the common law suits nor the refusal to deliver logs was an efficient proximate cause, without which the damages would not have happened. It is absurd, as a matter of fact, and certainly the Court cannot assume as a matter of fact that the asserted contributory causes would have caused the destruction of plaintiff's business if the attachments had not been issued and levied.

The following are cases where it was held that contributing causes do not defeat the right to recover full damages for the cause complained of:

Myers vs. Malcolm, 6 Hill, 292.

Chacey vs. Fargo, 5 N. Dak., 173.

If these common law suits and refusal to deliver logs had been acts of third parties, it is well settled that such acts would not defeat the recovery for full damages caused by The Atlantic Lumber Company, or its surety, the defendant.

Thus, the defendant's covenant is to pay the damages caused by the attachment. To hold that, where it is obvious the attachment did cause serious damages, and that because other even concurrent causes may have contributed to the same damages, there can be no recovery, would be a denial of justice.

The laws of Florida contemplate and provide for writs of attachment in a pending suit, but the statute requiring the bond does not contemplate, nor is it a fact that the pendency of the suit itself causes any injury that can be considered to reduce the damages caused by the attachment.

We think the contrary contention was never before made in any state.

In such case, the third parties and The Atlantic Lumber Company would be liable jointly or severally. It is so expressly held in:

Barrett vs. Railroad Company, 45 N. Y., 628.
Webster vs. Railroad Company, 38 N. Y., 260

In the latter case it was distinctly held *a refusal to charge* that if the acts of a third party contributed to the damages, plaintiff could not recover, *is not error.*

That rule of law being applicable to a case of contemporaneous contributory negligence, how much greater is the reason for applying it to the case at bar, *where the acts of The Atlantic Lumber Company were voluntary and deliberate, in suing out the attachments*, and defendant's becoming a surety was also voluntary.

To the same effect is *Burrows vs. March Gas Company*, L. R. 5 Exch., 67; *Pastene vs. Adams*, 49 Cal., 87.

Nothing can be shown in an action on the bond as a defense, except the truth of the existence of the grounds upon which it is issued.

Lobenstein vs. Hymson 90 Tenn., 606; s. c. 18 S. W. Rep., 250;

Drummond vs. Stewart, 8 Iowa, 341.

The surety is as much responsible as to actual damages for *"setting a-going"* the proceeding, as is the attaching creditor. (1 Shinn on Attachment, p. 329, citing 49 Mo., p. 25.)

No man or corporation ever went on attachment bonds for $85,000, without being fully advised of the nature of the attaching creditor's claims and risks taken.

The Supreme Court of Alabama had this subject before it in *Louisville Railroad Company vs. Jones* (1888), where in a suit by Jones for damages for personal injuries by defendant's negligence, the railroad company set up that plaintiff, at the time of the accident. *had pneumonia, which contributed to plaintiff's death.* Held: That the company must establish that he *must have died* from the disease, not *may have.*

that it was a question for the jury.

Id. 3 Sou. Rep., 902-904 and notes, it was also held

In *Beauchamp vs. The Mining Company,* 15 N. W. Rep., 65 (Mich.), where a similar defense was set up, it was held: That death must be referred to the cause complained of, unless it be shown that death must have resulted if the act complained of had not occurred.

It was for the jury to decide whether the other so-called causes so infected plaintiff's business with disease that it would have ceased to do business if the other injury, the attachments, had not happened.

In *Beauchamp vs. Saginaw Company,* 15 N. W. Rep., 65 (Mich.), the Supreme Court of Michigan quoted approvingly from *Baltimore Railroad vs. Reaney,* 41 Md., 117, as follows:

"But it is equally true that no wrongdoer ought to be allowed to apportion or qualify his wrong, and that, as a loss has actually happened while his own wrongful act was in force and operation, he cannot be permitted to set up as a defense that there was a more immediate cause of the loss, if that cause was in operation by his own wrongful act. To entitle such a party to exemption, he must show not only that the same loss might have happened, but *that it must have happened, if the act complained of had not been done.*" (Citing *Davis vs. Garrett,* 6 Bing., 716.)

The Supreme Court of Michigan further said in that case:

"If the injury received, and the sickness following, concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor. It cannot be said that there was a wrongful second act, or a disease wholly independent of the first wrong, which

caused the death of the boy." (Citing *People vs. Cook*, 39 Mich., 239.)

To like effect is *Railroad Company vs. Kemp* 43 Am. Rep.. 134 (Md.).

Now, we submit that the question whether one would have died from pneumonia if he had not been injured in an accident, is more replete with uncertainties, and a more difficult question for a jury to decide than whether plaintiff, with the property and assets it owned and credit it enjoyed prior to the attachment, it being then a going and flourishing concern, would have been able to obtain a full or partial supply of logs, and continued business.

On this subject, the Court is urged to consider that upon the evidence stated in the bill of exceptions, the following points of fact are undisputed:

(a) That on October 1st, 1897, plaintiff had on hand abundant orders for timber and that it had never closed down its mill for want of orders.

(b) That about October 1st, 1897, the prices of lumber commenced to advance, and continued to advance through 1899, from which it could be properly inferred there would be ample demand for the future product of plaintiff's mill.

(c) That plaintiff's mills were, on October 1st, 1897, in good condition, manufacturing their usual output, and between October 11th and November 16th actually sawed in thirty working days 3,600,000 feet, or 120,000 feet per day; and then closed down because it had sawed up the 3,000,000 feet of logs in the boom and was unable to buy more.

(d) That logs for a full supply of plaintiff's mills could have been obtained within six months at the outside, and the weight of the testimony, that of Ambler,

Bucki and Heagey, within two months, Ambler qualifying his testimony by saying that "irrespective of profits" it could have been done within sixty days. (Making profit in logging would not have been a consideration with plaintiff. It had been paying seventy-five cents above the market price and had, notwithstanding, made large profits, prior to October 1st, 1897. Plaintiff would only have calculated on getting logs at such a price as would have enabled it to have made its usual profits by manufacturing and selling.) (Rec. pp. 95-96.)

(e) Plaintiff's officers had had large experience in logging, knew where timber was to be found in abundant quantities, and had within their control thirty-three miles of railroad iron, fifty-two truck cars and three engines, available, with some repairs, for logging. (Rec. pp. 80, 81.)

(f) That it had ample means of obtaining the requisite number of mules, tackle and logging carts, and laborers to cut and haul the logs.

With all its assets, amounting to *two hundred and ten thousand dollars, at least*, including cost of mills, and with no pressing debts or obligations, except the claims of The Atlantic Lumber Company, which did not exceed, in reality, in any event, six thousand dollars, and this was disputed because of small size of logs, could any jury have hesitated to find that there was reasonable certainty that plaintiff, by logging itself or buying logs of others, or both, could have supplied its mills with logs? (Rec. pp. 97, 98, 99.)

We submit that it could not, and that the question should have been submitted to the jury.

All of the above facts clearly appear in the bill of exceptions, embracing 81 pages. (Rec. pp. 55-136.)

Unless it is established that some other cause must have produced the damage, it will be attributed to the act complained of.

In *Milwaukee etc., Railroad Company vs. Kellogg*, 94 U. S., 470, the Court said: "When there is no intermediate efficient cause, the original wrong must be considered as reaching the effect and proximate to it."

Refinements beyond this rule "are too minute for rules of social conduct." (Id. 476.)

And it is the province of the jury to examine any succession of events and determine what was the proximate cause. (Id.)

In all these cases, and upon all these points as to cause and effect, it is a question of fact exclusively for the jury.

Jacksonville, etc., Company vs. Peninsular, etc., Company, 27 Fla., 116, and cases cited.

And the rule of damages is a question of local law:

8 Am. & Eng. Enc. of Law, 2d Ed., 581.

94 U. S., 470.

WANT OF CERTAINTY OF PROOF.

It may be contended that the assumed difficulty the jury would have had in separating the amount of the damages caused by the attachments from the amount assumed to have been caused by the common law suits, and loss of log supply from The Atlantic Lumber Company, was not the only ground on which the Court refused to submit the question to the jury. But if that ground is admitted not to justify the action of the Court, what other ground can possibly be invoked to justify it?

Certainly none, because there was no evidence tending to establish and justify a finding that the plaintiff could

not have continued in business, if no attachments had issued, though the common law suits had been brought and The Atlantic Lumber Company had refused to deliver more logs.

A supply of logs would have been the only thing wanting to enable the plaintiff to continue in business, and the case would stand as follows:

(a) The evidence is not disputed that there was plenty of standing timber in the market. (Rec. pp. 81, 82.)

(b) That the mill was located at Jacksonville, where railroads from timber lands centered. (Rec. p. 79.)

(c) That the mill was located on the St. Johns river, which, with the tributaries, furnished carriage by water for logs from millions of acres of standing timber. (Rec. p. 79.)

(d) That The Atlantic Lumber Company alone has continued to get out and deliver to other mills two million feet per month since October 1st, 1897. And that there were other loggers. (Rec. p. 81.)

The only remaining element to enable the plaintiff to have continued in business was: Had it the means to get logs, or to buy them with?

On this point the case stands as follows:

(a) The mill plant, costing not less than one hundred and thirty thousand dollars ($130,000), in good condition, was entirely *unencumbered.* (Rec. p. 96.)

(b) It had on its docks and wharves over 8,000,000 feet of timber and boards, including logs in boom, *entirely unencumbered,* which, at an average of ten dollars per

thousand, at Jacksonville, would amount to....	$ 80,000
Good bills receivable	15,000
Timber afloat, 1,000,000 feet.....	10,000
	$105,000

(Rec. p. 96.)

(c) Its total liabilities were.....	$ 63,000
Of which there was held by stockholders of the Company, who did not want payment,....	32,000
Leaving current debts amounting to	$ 31,000

(See Rec. p. 97.)

And some of this claimed by Atlantic Company and the Bank disputed. (Rec. pp. 97, 98, 111.)

(d) Two of its principal stockholders owned thirty-five miles of iron rail, fifty-two trucks and three engines, suitable for logging, with some repairs, and which plaintiff could control for that purpose. (Rec. pp. 80, 81.)

(e) Its officers and agents were experienced as loggers and it had plenty of orders on hand.

(f) It had 3,000,000 feet of logs on hand when the attachments were levied.

With such evidence before the jury, it is incredible that the Court took the said question from the jury on the ground that there was no evidence tending to prove that plaintiff could have obtained logs and continued in business.

Besides, excepting The Atlantic Lumber Company's claim for about $8000, and a draft for $5,340.75, against which plaintiff claimed a set-off, it had *not a debt due*, except what was due laborers who are paid periodically, and were paid in full October 11th, 1897. (Rec. pp. 97, 98, 99.)

PLAINTIFF'S FINANCIAL CONDITION — ADMISSION BY DEFENDANT AS TO ASSETS.

The defendant admits in its own bill of exceptions, on its writ of error (Rec. p. 68), that between October 11 and December 28, 1897, the plaintiff received, as the proceeds of about 4,000,000 feet of lumber shipped, the sum of about $40,000. (Rec. p. 201.) It still had about 4,000,000 feet more to ship. Plaintiff had gained possession of this lumber by giving forthcoming bonds, and held it as *bailee of the sheriff*. In the eye of the law, this lumber remained in the sheriff's possession to abide final judgment in the actions, and plaintiff was bound to deliver it back to the sheriff if the attaching creditor had maintained its writs. Plaintiff took the risk of shipping this lumber (which was sold before the attachments issued, to avoid damages by breach of contract with the buyers.

With the proceeds it paid the creditors who had become clamorous, as a result of the writs. Much of such *proceeds were eaten up* in Court expenses, counsel fees, salaries of employees, and office rents in Florida and in New York, under unexpired leases.

NO CASH ON HAND.

Defendant, with much apparent joy, parades before the Court the fact that on October 1st, 1897, the day of the attachments, the plaintiff had no cash on hand. Defendant and the attaching creditor well knew the reasons why plaintiff had no cash on hand on *that day*. For over *three months* prior to October 1st, it had been unable to realize on its lumber, because the purchasers, under their contracts, did not pay for it until *loaded on vessels;* that,

owing to a temporary scarcity of vessels, they could not be chartered by the purchasers to remove the lumber.

Meantime, plaintiff kept sawing and piling up lumber on its yards and docks at a cost of $18,000 per month, the most of which it paid. The cost of logs alone, purchased from the attaching creditor, was $7.25 per thousand, or $14,500 on 2,000,000 feet—*its monthly consumption of logs.*

Plaintiff had paid this attaching creditor for logs *within two weeks next prior to October 1st,* on account of logs, $10,000, though much inferior to logs contracted for. All these facts are undisputed. (Bill of exceptions, Rec. p. 86.) Necessarily, plaintiff *had exhausted* its accommodations of cash from prior sales and its line of credit, temporarily, in the two banks in New York city, with which it did business.

To tide over this unexpected emergency, arising from the scarcity of vessels, plaintiff had consummated a temporary loan of $25,000 from Sheppard, Morse & Co., of Boston, *one of its customers, to be paid for with boards already sawn, with security on its mill plant,* until the boards could be delivered in Boston. This was all the cash it needed. This trade with the Boston concern had been delayed several weeks by reason of the *flaw* discovered in the title to its realty, of there only being one witness to a deed, in the chain of title, whereas the law required two. But on September 30th, p. m., the *day before the writs were levied, this flaw had been cured* by the discovery *of a deed with two witnesses, the title* pronounced perfect by counsel for the Boston company, the notes and mortgage for the $25,000 had been delivered to the Boston company and the $25,000 would have been received in New York office not later than October 3d if these writs had not been levied. *They were levied to defeat the receipt* of the $25,000, *and did defeat it.*

Nevertheless, within a few days after these writs were levied, the plaintiff's officers came from New York to Florida with $10,000 in their pockets, advanced to plaintiff by the Yellow Pine Company (a purchaser of a large part of plaintiff's output of lumber), and under said arrangement with the sheriff, resumed sawing.

All these facts are undisputed, and defendant company and the creditor knew them. (Rec. pp. 86, 72, 73.)

In the light of such evidence, the *flourishing* the fact that plaintiff had no cash on hand on October 1st is not a praiseworthy act. *It certainly would have had no influence on a jury on the question of plaintiff's financial ability to have continued in business after October 1st.*

Some of plaintiff's drafts for logs went to protest. Defendant company also sought to show inability of plaintiff to continue in business after October 1st, because of injured credit by certain drafts going to protest. Between July 15th and August 15th, 1897, a few drafts did go to protest, but were all quickly paid. The drafts were sixty and ninety-day drafts, and were drawn *on the expectation that lumber on hand would be shipped to meet them*, which, owing to such scarcity of vessels could not be shipped.

This evidence as to protested drafts was illegally admitted, to effect the condition of plaintiff's credit *on October 1st, because it is an admitted fact* by defendant itself *that all of such drafts were paid a few days after maturity, and all paid by August —six weeks prior to the attachments.*

Plaintiff had practically overcome this unexpected state of affairs arising from want of ships, *which it was the duty of purchasers of lumber to charter.* Its mills were running at their full capacity on October 1st, the output on that day being 100,000 feet. A few days after October 1st, and after the attachments, it paid off its employees. It had but *one piece of paper overdue and*

outstanding. This was a draft given on August 16th to this attaching creditor as a vendor of logs for $5,340.75, of which $3,340.75 was for logs *delivered prior* to August 15th, and $2,000 was *an advance to such vendor for logs to be thereafter delivered.* (Rec. pp. 84, 85 89.)

Said draft was due *ten days after date.* It was negotiated and discounted and on October 1st was held by the National Bank of Jacksonville, *which cashed it.* It had not been paid for two reasons:

(a) Because the holder was not alarmed about payment and because of non-arrival of vessels, and,

(b) Because plaintiff claimed a set-off to it of $4,000.

The evidence establishes all such facts beyond dispute. (Rec. p. 83.)

Therefore the fact that such drafts were protested and all paid *six weeks prior to the attachments,* would have had no weight with a jury on the issue of plaintiff's credit or ability to continue in business, on and after October 1st, 1897.

Such testimony could be relevant for no other purpose, and was illegal for that purpose, for the reason the drafts, being paid six weeks before the attachments, had tendency to establish that on October 1st the plaintiff could not have continued in business if these writs had not issued. (See testimony of Meigs, an officer of the attaching creditor, pp. 84, 85.)

Considering the cost of its mills, about $150,000, its assets on hand; that there was not a lien of any nature upon any of its properties; that not a suit of any nature was pending against plaintiff, prior to October 1st, 1897; that it had but the one matured piece of paper outstanding, and for only $5,340.75, with lumber on hand for which

it would have received not less than $65,000 in a few weeks; its lumber afloat and bills receivable; that its total debt was but $63,000, $32,000 of which held by two stockholders, *who did not want payment* but interest on it; much of this followed, doubtless, in consequence of scarcity of vessels; only $31,000 current debts, *including* the attaching creditor's liquidated claims, largely disputed, and amount due employees, which was promptly paid, and said draft for $5,340.75—*it is plain the plaintiff's financial condition was exceptionally good;* and few business concerns in that branch of business could make as good a showing—there is hardly room for doubt of plaintiff's ability to continue in business.

In any event, the plaintiff had a right to have the question of its ability to continue in business (but for these writs) submitted to the jury, as well for the time *after* as before October 1st, because it was a question of fact.

In the case of *Grimes vs Bowerman,* 92 Mich., 258, where the defendant in attachment *was greatly embarrassed,* it was expressly ruled, that *his ability to carry his debts and continue in business was a question for the jury.* You might as well say, in an action for lost profits for a breach of contract, the plaintiff's ability to continue to perform shall not be tried by a jury.

The trouble was, plaintiff had too much lumber on its docks.

The proof established that for several months next prior to October 1st, the net profits of the plaintiff's business was $5,000 per month, notwithstanding the fact that its sawmill was shut down half of the time in August and September,*because the wharves were so crowded there was no room to pile lumber on them to advantage.* Defendant admits this. (See Rec. p. 80, Defendant's Rec. p. 49.)

And the defendant and The Atlantic Lumber Company knew perfectly well nearly the entire output of its mills was sold for the year A. D. 1897; and had ample means to meet all of its liabilities. It also knew that plaintiff was not doing business upon borrowed capital; that it was not a borrower of money in the markets, and that the loan negotiated with Sheppard, Morse & Co. was only temporary, and was rendered desirable by the crowded state of its wharves, and that these attachments would defeat such loan.

The Atlantic Lumber Company was seeking a pretext to break its contract for log deliveries, because it was delivering logs smaller than called for by its contract, and the price of logs was increasing in the market, and it could sell its logs at a higher price than plaintiff was paying.

CERTAINTY OF PROOF.

While we do not think the rule of requisite certainty of proof is involved, because of the refusal of the Court to submit the main question to the jury was not on that ground, we cite some authorities on the subject.

Reasonable certainty, or reasonable probability, is the correct rule, as distinguished from speculation and guess work. (Sedgwick on Damages, Sec. 177, 182.)

This "reasonable certainty does not mean absolute certainty, but reasonable probability." (Sedgwick, p. 249.

"But the fact and amount of future loss is a question for the jury, which has discretion in establishing it."

Id. p. 249.

Allison vs. Chandler, 11 Mich., 542.

Where it was held that plaintiff has sustained damages by interruption of business by defendant's acts,

though innocently done, the amount of damages must be submitted to the jury upon all the evidence the nature of the case is susceptible of, even though such damages cannot be estimated with a great degree of certainty. "and the actual damages must be more or less a matter of opinion."

Id pp. 560, 561.
6 Bing., 68.
10 N. Y., 489.
17 Wendell, 71.
120 U. S., 647.

Even in case of any doubt, justice requires that the loss should fall upon the defendant who has caused the injury, and not upon an innocent plaintiff. (11 Mich., 554, 555.)

"The Court has no concern with the weight to be given to evidence which was properly admitted." (140 U. S. pp. 77-91.)

The same principle applies as in case of contributory negligence, and in such cases where the facts are such that "reasonable men may fairly differ" they must be submitted to the jury.

Grand Trunk Railroad Co. vs. Ives, 144 U. S.,408.
159 U. S., 603.
168 U. S., 339.

From the language of the Court stated in the 24th assignment, it appears that the Court was greatly concerned about the "difficulty" the jury would have in assessing damages, and therefore concluded not to allow them to assess any at all. (Rec. p. 44.)

In *Simpson vs. Railroad Company*, 1 Q. B. Div., 274, Cockburn, Ch. J., said: "As to the supposed impossibility of ascertaining the damages, I think there is no such

impossibility. To some extent, no doubt, they must be a matter of speculation, but that is no reason for not awarding any damages at all."

And Mellar, J., said: "As to the difficulty of ascertaining the amount of profits which the plaintiff can be supposed to have lost, *that is not a matter upon which we have to trouble ourselves.*"

Frier, J., said: "As to the difficulty of ascertaining the profits which the plaintiff can be considered to have lost, a sufficient answer is that it must be assumed that the plaintiff would make some profit." (See also 120 U. S., 647.)

The case of *Simpson vs. Railroad Company*, supra, is cited in *Wakeman vs. Wheeler Wilson Company*, 101 N. Y., 205, s. c. 4 N. E. Rep., 264.

This is a valuable case to the point that though there may be difficulty in arriving at the damages, there is no reason for not submitting the subject to the jury.

1 Sutherland on Damages, 113.

10 Allen, 138.

Wells vs. National Life Assn., 99 Fed. Rep., 222.

In that case, the Court has cited approvingly several of the leading cases relied upon by plaintiff in error, and it is conclusive that the damages caused by interruption of plaintiff's business by the attachments should have been submitted to the jury; even admitting that the alleged contributory causes might make the assessment of such damages difficult.

Clearly, the uncertainty of proof as to how much Wells might have made in the business of insurance in a certain territory, for a period of years, was greater than the uncertainty of proof as to how much plaintiff lost in its business by the interruption thereof, caused by the attachments.

Profits of an established business may always be received even in the performance of a contract, if they can be proven with reasonable certainty, or reasonable probability.

I Sedgwick on Damages, 8th Ed., Sec. 182.
10 N. Y., 489.

Anville Mining Company vs. Humble, 153 U. S., 540; in which the opinion of the Court, pp. 549-550, is peculiarly applicable to the case at bar.

In the case of the "Conqueror," 166 U. S., 110, it was held: "The value of her use to the owner, while detained, was a proper measure of damages; and that the books of her owner, showing her earnings prior to detention, are admissible, to show probable future earnings."

Id. p. 127; also
1 Sedgwick, Sec. 182.
I Sutherland, Secs. 54, 59, 70.
18 Fed., 316.
12 Fed., 266, 267.
2 Woods, 603-599.
22 Fed., 220-224.
Max vs. Strous, 93 Ala.
S. C. 9 So. R., 88.
70 Ala., 38.
23 Ohio St., 358.
80 Texas, 195.
92 Mich., 260.
120 U. S., 630-648.
Pollock vs. Gantt, 69 Ala., 373.
S. C. 44 Am. Rep., 519.
48 Am. Dec., 194.
10 So. Rep., 372 (La.)

The common law suit laying large damages *would not have produced any immediate effect upon plaintiff's*

business or credit. But very few persons would immediately know such a suit had been brought.

The plaintiff would not have been interrupted, or its credit injured as an immediate consequence of serving such a summons.

The refusal of the Atlantic Lumber Company to deliver any more logs would have produced no immediate injury to plaintiff's business or credit. It had 3,000,000 feet of logs on hand, and its business would have gone on as usual (as it did go on, with the permission of the sheriff), for at least about six weeks.

But when the attachments were levied, immediately plaintiff's logs were taken from its possession, and sawing stopped. Five million two hundred thousand (5,200,000) feet of lumber was taken from plaintiff's possession, and its shipment was stopped at once. Thereby its credit was injured and its means of business taken away from it.

It is therefore apparent that the immediate and proximate cause of the *initial injury to plaintiff's business and credit was the issue and levy of the attachments* and the common law suits and the refusal to deliver logs did not even contribute to such initial injury.

Part of the damage was done when the attachment was issued; this would be known to the world at once. The levy and continuance of the lien of the levy simply augmented the damage. The common law suits and refusal to deliver logs could not have had any appreciable effect in aggravating the damages. They cannot even be treated as concurrent or contributory causes. They were, if anything, intervening, but not efficient, causes, because they could produce no injurious effect until after the attachments were levied.

But no jury would decide that they were independent efficient intervening causes of the damages which necessarily were directly caused by the attachments. As mere contributory cause, they cannot be allowed to affect the

right of recovery of damages for the wrongful attachments. The dominating, overmastering cause was the attachments.

Plaintiff has no remedy for the commencement of the common law suit, unless it was malicious and, even then, it is doubtful.

Plaintiff's remedy by suit for the refusal to deliver logs could not include damages for the interruption of plaintiff's business or to its credit, for the measure of damages would be simply the difference between the price The Atlantic Lumber Company had agreed to deliver logs for, and the market price, or cost of supplying them from other sources. As such cost might be less than the contract price, there might be no damage.

Therefore, if the ruling of the Court below is correct plaintiff has no remedy for the interruption of its business and injury to credit caused by the attachments. The result would be a denial of justice, or the right to have any such damages as a jury may assess. For if the jury once found that the attachments caused the interruption of business and damage to credit in connection therewith, the evidence of past profits would entitle them to estimate the damages with accuracy.

We ask the opinion of this Court on the above assignments of error upon these points.

(a) That there can be no abatement of damages resulting from the attachments, because the common law suits or refusal to deliver more logs may have contributed to such damages.

(b) That the amount of damages from interruption of plaintiff's business caused by the attachments must be submitted to the jury, and that the question to what extent the common law suits or refusal to deliver logs contributed to such damages must not be submitted to the jury.

PRESUMPTIONS.

1st. From the fact that plaintiff was able to operate the mills from April, 1893, to October, 1897, a presumption arises it would continue to be able to do so, in the absence of evidence to the contrary.

2d. It being established that there was an abundant supply of logs in the region of, and accessible to, plaintiff's mills, *not owned by the Atlantic Lumber Company*, the attaching creditor, it would be a presumption, in the absence of evidence to the contrary, that a log supply for plaintiff's mills could be obtained, that such log supply *was not dependent on one logger, the Atlantic Lumber Company*, and that *other loggers* could furnish logs to plaintiff at a cost no greater than it had been paying said company, which *was seventy-five cents above the market price of such logs.*

3d. It would be presumed in this case, as in others, that the *natural laws of supply and demand would be operative*, and that the supply would be equal to the demand—the supply being shown to exist in the forests beyond question.

Plaintiff's officers were experienced loggers, and their testimony is that they could have commenced delivering into the boom *a full supply within sixty days*, if the writs had not issued. (Rec. pp. 80, 81, 95 and 96.)

Ambler, the president of the attaching creditor, admits such a supply could have been obtained within sixty days, if no *profit* in logging was considered. (Rec. p. 81.)

Plaintiff had no need to do logging *at a profit;* the profits in manufacture was all it had to consider. Meigs

general manager of the attaching creditor, *under certain conditions, he states, testifies it would have taken plaintiff* six months to have prepared to deliver at its mills a full supply of logs. (Rec. p. 95.)

But as shown, plaintiff had the equipment on hand.

One, Murphy, testified for defendant that to supply plaintiff's mill with logs, would have required an investment of $150,000 to $250,000, including iron rails.

Murphy was a mere clerk or salesman, living in New York city, and it was not shown that he knew anything about logging in Florida, or that he ever had had any experience in that business anywhere. It was clearly incompetent, and would have had no weight with the jury. Meigs, himself, placed the cost of such logging equipment at $50,000 to $75,000, including iron rails, and he had had extensive experience in Florida. (Rec. pp. 83 and 102.)

But it is undisputed that Charles L. Bucki and his mother, Frederica Bucki, under the firm name of L. Bucki & Son, *owned and had in their possession, laying idle in Florida, thirty-four miles of iron rails, suitable for logging purposes, and three locomotive engines,* and fifty-two flat cars, which, with some repairs, could have been immediately brought into use in a logging business and that *they owned nearly all the stock of the plaintiff company.* (Rec. pp. 80, 81.)

So that all it was necessary for plaintiff to purchase for a logging outfit was some mules, harnesses and carts, and repair cars and engines. To do this with, if these writs had not issued, plaintiff would have had its mill plant, which cost about $150,000; its bills receivable, about $15,000; its lumber afloat, $10,000; its 80,000,000 feet of manufactured lumber on its yards and docks, (including that cut from the 3,000,000 feet of logs in the boom, which cost $7.25 per thousand, or $21,750).

This 80,000,000 feet was nearly all sold, waiting shipment, and there was an active market for that unsold. Sixty-eight per cent of it was square timber, and a large per cent of the remainder was first-class boards, and it was worth not less than $65,000.

Thus, plaintiff had in such assets, after paying all its floating current debts of $31,000, about $60,000 in lumber *and its mill plant, not a lien or encumbrance of any kind upon it*, with which to continue in business, *and not a suit pending against plaintiff.*

Scarcity of vessels to ship the lumber was only temporary, as it subsequently turned out.

In such financial condition, it is nonsense to contend that plaintiff could not have continued in business, if these writs had not issued.

And we repeat, the ruling of the Court, refusing to submit the question of damages from the loss of the use of its mills, after October 11th, was not placed on that ground.

The defendant's contention on that ground *was overruled*, and the trial judge based his rulings on the ground of *contemporaneous contributory causes*, which we submit was error, prejudicial to the plaintiff, and that the assignment of such error is well taken.

Points of Law.

If the lower Court's reasons for taking the case from the jury, to wit: because of contributory causes, were erroneous, it may be urged that the ruling was right though its reasons wrong, *because loss of profits from loss of use of mill was too remote*, and in no event should that element of damages have been submitted to the jury. *because too remote.*

Plaintiff insists such damages were not too remote, and that that question was one for the jury.

We think it is satisfactorily established that the trial judge refused to submit this element of damages to the jury, *except for the period of time between Friday, October 1st, 1897, in the evening of which day the attachments were levied, and Monday, October 11th of said year,* the day the plaintiff resumed sawing under the agreement aforesaid with the sheriff. During such excepted period of time, the sheriff had the possession of the logs in the plaintiff's boom, by his seizure under the writs, and it was impossible for plaintiff to operate the plant.

As shown, the trial judge ruled that such damages were not too remote, and submitted them to the jury for the *period of time between October 1st and October 11th*, and submitted the evidence of plaintiff's books to the jury, showing *past* profits *to enable them to estimate* such damages for the *period aforesaid.*

Now, if such damages were not too remote for that period, they were not too remote for the period of over twenty months *after October 11th.*

And it is evident the jury understood the apparent conflicting instructions, as already explained, and that the damages for loss of the use of the mill plant, after October 11, was not submitted to them. For their general verdict was for $10,880, whereas if such damages had been submitted for the period of over twenty months after October 11th, it necessarily would have been much more, and could easily have been over $100,000.

The only elements of damages submitted to the jury, apart from lost profits, between October 1st and the 11th, were as follows:

(a) Profits lost on three cargoes of lumber, one to Boston, one to New York and one to Baltimore, because of inability to ship it while under attachment.

(b) Legal interest on the value of lumber detained by the writs.

(c) Wages paid employees, idle by reason of the attachments.

And the testimony establishes that *said three elements of damages* easily aggregated $10,880, the amount of the verdict.

There can be no question but that the jury excluded all damages from loss of use of mill plant subsequent to October 11th, according to instructions of the Court. For excluding such damages, error was assigned in the Appelate Court, and is assigned now. Rec. pp.32-34.

A majority of the judges of the Court of Appeals expressed no opinion on these assignments, but by silence affirmed the action of the trial judge.

Judge Shelby delivered an opinion denying plaintiff's right to recover for the loss of the use of the mill plant *at all, either before or after October 11th.*

48 C. C. A., 437, *et seq.*

And based his opinion on the sole ground that such losses were *too remote,* and ruled they could be recovered in an action for malicious prosecution of the attachments. Rec. p. 138.

THE PROPOSITION PRESENTED.

The proposition now presented for decision is this: that such damages are not too remote, unless the covenant in the bond to pay *all damages sustained in consequence of improperly suing out the writs.*

Condition of Bond, Rec. p. 9.

It cannot be pretended that the writs did not deprive the plaintiff *of the use of its manufactured product seized, of the value of $65,000.* It cannot be denied that the levy of the writ for $75,000 *created a first lien on the mill plant for that sum of money.*

It cannot be denied that if these writs had not issued, plaintiff, after paying current debts, would have had the manufactured product of its mills of the cash value of $60,000 and its mill plant, free from all liens, as a basis for credit with which to have bought or obtained logs and continued in business.

The $60,000 alone, apart from its unencumbered mill plant, as already chown, would apparently have been ample for such purpose.

Therefore the argument comes to this: *the writs did directly deprive plaintiff of the use of its assets in the business, to wit: its lumber and mills.* It could not sell and use the proceeds of its lumber in its business, for it was under attachment for $85,000. It could not raise any money on its mill plant, for it was under attachment for $75,000.

The writ for $75,000 was levied on the plant.

A mill plant, unless it is a going concern, is of little value. No one would lend money on the mill plant with an attachment lien on it for $75,000, though it cost twice that sum.

Assuming then that a finding that the plaintiff *had the financial means, if these writs had not issued,* to have continued in business, *either operating its mill at full or part capacity,* would have been justified, the question is:

(a) Did the deprivation of such means, in consequence of the writs, cause a deprivation of the use of its mills?

This was a question of fact for the jury.

(b) **Are profits lost by the loss of the use of the plaintiff's mills *too remote to be recovered in a suit on these bonds?***

This is a question of law, and it is an *established principle of law that the recovery* of profits of an established business is not *too remote*, whenever the amount thereof is provable with reasonable certainty, and evidence of past profits of such a business is good evidence upon which to *estimate the lost profits.*

POINT OF LAW.

We insist that *the rule of the measure* of damages in an action of trover or trespass, for the mere seizing and detaining of personal property, either on final process or by attachment, *has no application to this branch* of the case at bar.

These writs were issued on a claim of *debts due.*

The Revised Statutes of Florida authorize an attachment *only upon certain conditions*, to wit: "Before any attachment shall issue in any of the foregoing cases (reference being to Sections 1637 to 1640), the plaintiff shall file in the Court from which he desires the attachment, an affidavit in writing, sworn to by himself, his agent or attorney."

Revised Statutes, Section 1641:

"Attachments, when debt is due.—In cases where the debt is actually due, such affidavit shall state the amount of the debt, or sum demanded; that the same *is actually due*, and that the affiant has reason to believe in the existence of one or more of the special grounds hereinbefore enumerated in Section 1637, stating specifically such special grounds."

R. S. Sec. 1642 and Section 1646 provide as follows: "No attachment shall issue until the person applying for the same, his agent or attorney, shall enter into a bond, with at least two good and sufficient sureties, payable to the defendant, *in at least double the debt or sum demanded, conditioned to pay all costs and damages the defendant may sustain in consequence of the plaintiff's improperly suing out said attachment.*"

The condition of the bond required by statute is *very broad*, and the liability is consequently broad. The obligor is bound to pay *all damages sustained as a consequence* of "improperly" suing out the writ.

"Improperly" is a very broad term, more perhaps so than "wrongfully," employed in the statutes of some of the states.

In any event, if the plaintiff files a false affidavit, *either as to the amount of debt due, or grounds of attachment*, the writ has been "improperly" sued out, and when the attachment is dissolved, the obligor on the bond becomes liable.

In this case, the writ for $9,980.80 was dissolved on the face of the papers.

The second writ, for $75,000 was dissolved on issues of fact joined, on the ground that defendant did not owe the debt.

The contentions of the defendant surety company are based on the following propositions:

1st. The mill plant was realty, *and the levy of the writs did not remove the plaintiff here from the possession of its plant;* did not dispossess and did not authorize the sheriff to dispossess the plaintiff of *any lands or tenements.* (Rev. Stat., Sec. 1651.)

Consequently, these writs did not prevent the plaintiff *from going on in its business as usual, if financially able to do so*, and therefore the levy of the writs *did not cause the interruption of plaintiff's business.*

2dl. The levy of the writs on the *personal property* of plaiintiff, to wit: 3,000,000 feet of logs in the boom pen and over 5,000,000 feet of manufactured lumber, the product of its mills—substantially all the means and *assets and stock in trade—the plaintiff owned, did not cause the interruption of the plaintiff's business*, and the latter was not a *consequence* of the levy on such personal property.

3dl. *That the cause of interruption of plaintiff's business was its financial inability to continue in business after such writs were levied; that the cause of that cause was not the writs, but was the plaintiff's want of means capitall and credit* (after all its assets had been taken away ffrom it by the levies and seizures) on which to do do business.

4tlh. That *consequently* the rule of measure of damages for which the defendant company is liable, if liable at all, *is the one applicable* to seizure and taking away personal property, to wit: if the property is not returned, *its value* and legal interest thereon. If the property is returned, *the injury done to it, if any, and interest on its value during the time it is detained, or the owner has lost the use of it.*

1. Plaintiff concedes the correctness of the 1st of above contentions of defendant, to wit: that the effect of the levy of the writs was not to physically dispossess it of its mill plant.

2. Plaintiff also concedes it to be a fact that it could have continued in business if it had had other req-

uisite means and capital, after the writs were levied, but it did not have such means.

It is apparent that the real issue of law involved on this branch of the case is this, to wit: "Was it the duty of plaintiff, imposed by law, to have had cash in bank, securities, or other property, *not levied on*, to enable it to continue in business

The argument comes to this: if an improper attachment levy takes away *all the property and means a business house has of continuing in business*, yet it is not the proximate cause of the interruption of its business, because it ought to have other, invisible means—money in bank, or securities in a safe deposit company, with which to buy a new stock of goods or raw materials for the factory.

That the wrong doer or attaching creditor did not *contemplate any damages* from interruption of business, because he had the right to presume the defendant in attachment had ample means, *not attached*, with which to continue its business.

Certainly, the defendant's contention is contrary to general experience. It is commonly understood in the business world that one's capital and stock in trade in his business is relied upon to enable him to continue in business; and if this is swept away by fire or storm, or other misfortune, he must go out of business; and if he owes debts, is insolvent and a bankrupt. We have found no case that supports defendant's contention, but several directly to the contrary.

In *Illinois Central Railroad Company vs. Cobb*, 64 Ill., 128-142, the suit involved damages for *non-delivery of personal property bought and paid for*, and it was contended that the plaintiff should have gone into the market and purchased other like personal property.

Answering this contention, the Court said: "*It would be very unreasonable* to require one who has *bought and paid for an article to have money in his pockets with which to buy a second article, in case of non-delivery of the first.*" Citing *Middlekouf vs. Smith*, I Md., 329 (to which we have not had access).

In *Dewey vs. Flitner*, 118 Mass., 131, the Court said: "A loss through deprivation of means of protection is *proximate and is a question of fact.*"

In *Watson vs. Sutherland*, 5 Wall., 74; and *North vs. Peters*, 138 U. S., 271, defendant's contention was overruled.

Before many law books were written, a renowned writer said:

"*You take my life when you do take the means whereby I live.*"

Loss of financial ability by a wrongful act ought to be as good a cause of action, as loss of physical ability. If a railroad company is sued by a passenger for damages for breaking his leg, whereby he is unable to do business, a plea that you have not necessarily suffered any damages because you ought to have bought another leg, would be nonsense.

If A. by a blow knocks the breath out of B., A. cannot reply: "You ought to have been able to breathe in some other way."

If A. is under contract with B. to construct a machine and furnish materials which he has paid for, and C. unjustly seizes such materials and carries them away, and A. sues C. for damages, including loss sustained by not completing his contract, can C. successfully plead: "You ought to have bought other materials and completed your contract with B." And would not A.'s reply: "I did not have the means to do so," be good?

A REVIEW OF SOME CASES CITED BY JUDGE SHELBY TO SUSTAIN THE CONTENTION THAT THE MEASURE OF DAMAGES IN THE CASE AT BAR IS THE INTEREST ON THE VALUE OF THE LOGS AND LUMBER LEVIED ON DURING THE PERIOD THEY WERE DETAINED FROM PLAINTIFF'S POSSESSION.

Coulson vs. Bank, 4th C. C. A., is cited.

The facts in that case were that a *flock of goats* were taken under a writ of attachment, and the rule was applied that the damage was the interest on the value of the goats while detained. Why? *Because that was all the damages the plaintiff could possibly have sustained.* (We doubt that he was entitled to any but nominal damages, because the possession and use of the goats *were of no value.*)

In that case, the Court relied on *Bates vs. Clark*, 95 U. S., 204, in which Army officers were sued for damages for illegal seizing of whisky, brought into Indian country. *The whisky was returned to the owner shortly after its seizure and before the suit brought.* The opinion states that the plaintiffs "*were doing a general mercantile business.*" The case, as reported, does not show that the seizure had any tendency whatever to injure plaintiff's business. The element of interruption of business was not involved, and from all that appears in the report of the case, plaintiff's business went on as usual, not only as to all other kinds of merchandise than whisky, but as to whisky too. It does not appear that any loss in selling whisky was suffered because of the seizure of this particular lot of whisky.

The Court held, the rule of damages was: "*the difference* between the value of the goods so seized at the place where they were taken and the place where they were returned to the owners."

Why? Because that was all the damages proved, or susceptible of proof. Nothing whatever is said in the case about "interest on the value of property detained."

It was a case of ordinary trespass at common law. Neither of the above cases have any application to the case at bar, for there was *no interruption of any business or loss of profits therein.*

Vance vs. W. A. Vandercoock Company, 170 U.S., 468, is cited.

That was an action of trover. The plaintiff was a citizen of California, doing the business *in that state of selling wines and brandies.*

It had shipped to South Carolina wines and brandies of the value of $1,000, which were seized and taken from a railroad depot by some officers of that state claiming the right so to do under its dispensary laws.

There was no pretense in that case that the plaintiff's general business in California *was impaired in any way much less interrupted for a moment.*

This Court held that the question of damages was one of local law and said: "The Courts of South Carolina as we have seen, have held that in an *action of trover, consequential damages* are not recoverable, and have also held that in the action of claim and delivery, damages for the detention must have respect to the property and to the direct injury arising from the detention."

True, plaintiff claimed it was a malicious trespass and that the detention of sixty-eight packages of wine had "*greatly injured its lawful trade and business* with the citizens and residents of the state of South Carolina."

Plainly that case can in no way control the one at bar, where its entire assets were seized and its business entirely destroyed.

It is equally plain that no *consequential damages could* have been proven in that case with any reasonable degree of certainty, to wit: to what extent such seizure lessened the plaintiff's trade in South Carolina, for that was all that was claimed. This Court in that case cites *Conard vs. Pacific Insurance Company*, 6th Pet., 262.

In that case the marshal had levied an execution at law on the teas of plaintiff, to satisfy a debt of an execution defendant. The goods so levied on had no connection with any established business. This Court in that case said: "that plaintiffs were *entitled to recover such damages only as they had proved themselves entitled to on account of the actual injury sustained by the seizure and detention of the goods and in ascertaining what those damages were* he [judge below] directed them that the plaintiff had a right to recover the value of the goods (teas) at the time of the levy, *with interest* from the expiration of the usual credit on extensive sales." Id. 282.

Plainly, in that case the Court adopted the rule that plaintiffs could recover all the damages they could prove. The question of loss of profits by the interruption of business was not involved in that case.

The case of *North vs. Peters*, 138 U. S., 271, and *Watosn vs. Sutherland*, 5th Wall., 74, are cited by Judge Shelby.

In the first of those cases, an attachment had been levied on goods owned by P., based on a debt against L. and *other attachments were threatened.* The Court enjoined the sheriff from enforcing the writs. The Court based its jurisdiction on the ground that the remedy at law, in an action of trespass or replevin, was not as *"complete, prompt, and efficient" as an injunction to*

prevent the injury; and that "*it would be extremely difficult to ascertain or estimate* the pecuniary injury the appellee would sustain." Id. 281.

The appellee had *recently purchased* the stock of goods from L. It does not appear from the report of the case that the complainant, or appellee, had *established and maintained such a permanent business* (as a retail merchant) as to enable future profits to be estimated *with reasonable certainty by evidence of his books of past profits* Indeed the report of the case shows the contrary, and that it would have been "*extremely difficult*" to ascertain such damages in a suit at law.

There could be no presumption that Peters, the purchaser of the goods from L., would be able to maintain as profitable a business as L., the seller, had. Indeed, the case shows that from Peters' old age, want of means, he could not do so. Besides, the case, as reported, does not state that L. had a profitable business.

Another element in the case was *that the goods were of a perishable nature.*

Another was the multiplicity of suits by the several defendants in attachments against the sheriff.

The case falls far short of being a direct authority for the defendant at bar, to exempt it from liability for damages from the interruption of business, under the condition of its bond.

In the case of *Watson vs. Sutherland*, 5th Wall., 74, the marshal was enjoined from selling on final process *fieri facias* a stock of goods recently purchased by the complainant, who owned the goods and was not the execution debtor. Jurisdiction was based upon the same grounds as in *North vs. Peters*, supra, *i. e.*, that the remedy at law against the marshal was not *as speedy,efficient and complete as could be afforded by an injunction.*

This Court, in stating that the remedy at law would be inadequate, applied the rule of damages applicable to the seizure and detention of personal property, and cites *Conard vs. Pacific Insurance Company*, 6th Peters, 272-282, for a definition of the rule.

The Court, also, in passing, employes these words: "*Loss of trade, destruction of credit and failure of business prospects, are* collateral or *consequential* damages, which it is claimed would result from the trespass, but for which compensation cannot be awarded in a trial at law."

"Any harsher rule would interfere to prevent the assertion of rights honestly entertained and which should be judicially investigated and settled." Id. 79.

The report of the case states that complainant alleged he was a "young man, recently engaged on his own account in merchandizing and had succeeded in establishing a *profitable trade*," that his stock was "*purchased for the business of the current season, and not paid for.*

Id. 75.

The answer shows complainant purchased this stock of goods on the 27th day of October, 1862, and as the case was decided in the Supreme Court in December, 1866, the levy must have been made soon after the purchase of the stock.

It was impossible, therefore, that the complainant had built up and maintained *for any length of time, an established business of such a character as to bring the case within the rule that interruption of an established business* by a wrongful act, renders the wrong doer liable for loss of profits, where they can be proven with reasonable certainty.

For statement of such general rule, see 1 Sedgwick on Damages, Sec. 182.

All that is decided in Watson vs. Sutherland, and in *North vs. Peters*, supra, is that in those particular cases *owing to their special facts and circumstances*, the rule of damages for the seizure and *detention of personal property applied, because of the uncertainty of proving any greater damages.* The Court did not disapprove of the rule that where loss of profits of an established and interrupted business can be proven with reasonable certainty, and were caused by the *wrongful act*, they are recoverable. The two elements must co-exist: *reasonable certainty of proof* of the damages, and they must be caused by the wrongful act or by a consequence of it.

I Sedgwick, Sec. 182, text and cases cited.

In *Chapman vs. Kirby*, 49 Ill. 211-219, the opinion of Justice Walker states the law on the subject. Also, *French vs. Connecticut R. L. Co.*, 145 Mass., 261, where "the defendant obstructed a river, as *consequence of which the plaintiff lost custom* at his hotel on the bank. It was held that he could recover compensation for the diminution in his business and profits."

I Sedgwick, Sec. 182, text p. 266.

[Note—*Watson vs. Sutherland* and *North vs. Peters* are both authority to the point that *the law did not require the Bucki Company to own or control other means not levied on with which to buy logs and continue in business.* For the contention was made in those cases that the stocks of goods seized consisted of articles that could have been *easily bought in the market.* 5 Wall., 76.]

And the Court mentions in its opinion in each case that *the owner of the goods did not have the means to buy other goods.*

This certainly destroys the theory of the defendant company that it is not liable because it could not have

contemplated that the Bucki Company did not have means not levied on with which to continue in business, notwithstanding the attachments.

It is submitted that the cases cited by Judge Shelby do not support his conclusion that in the case at bar the defendant company is not liable to damages caused by interruption of plaintiff's business, because too remote and consequential. Judge Shelby did not pretend that this element of damages was not susceptible of proof with all reasonable certainty.

What the learned judge said in respect to the condition of the bond, not including *vindictive* damages, as in case of an issue of malicious prosecution, was unnecessary to be said, for neither party made any such contention.

What we contend for is that the condition of the bond includes all *actual damages sustained in consequence of the writs*, and that the Legislature so intended.

Judge Shelby's views are here mentioned because presumably they state the views *upon this particular point* of the other two members of the Court, who affirmed in legal effect by their silence all that the Circuit Court decided, save on the subject of counsel fees.

The cases we have reviewed involved liability under *non-contract law*, while the case at bar involves liability *on contract*.

A strictly common law liability in an action of trespass is narrower than the contract liability under the condition of the defendant's bond.

The case of the "Conqueror," 166 U. S., 110, was the case of the seizure and detention of personal property, to wit: a steamboat; and this Court applied a rule of damages as follows, to wit: "The value of her *use to the owner while detained was a proper measure of damages*;

and that the books of her owner showing her earnings *prior to detention* are admissible to show *probable future earnings.*"

This Court did not hold in that case that the owner of the steamboat, after its seizure, *should have bought or leased another boat* to put in its place, and restrict the damages to interest on the value of the "Conqueror" while the owner was deprived of the use of it. This Court recognized the distinction where the *personal property, in* connection with other property, has by its use an earning capacity.

Now, if the effect of seizing under these attachments *all available assets* of the plaintiff, whereby as a consequence of such seizure it was financially disabled to buy logs to continue its business, why has it not been deprived of the use of the mill plant as a direct result of the seizure of such assets? the same as if the mill plant itself had been seized and taken from the possession of the plaintiff; and why should not the same rule of damages be applied as was applied to the case of the "Conqueror?"

The ground of recovery of profits lost is *the inability to earn them, caused by the wrongful act* of the wrong doer.

If this inability is the proximate and consequential effect of the wrongful act, then that relation of cause and effect is established upon which damages are awarded. In the case at bar, the fact that the seizure did not operate to remove plaintiff from *possession of its realty and the mills* located on it, cannot be material, provided the effect of seizure of its logs and manufactured product constituting its stock in trade *and entire means of doing business* prevented plaintiff from operating its mills.

All parties concerned in wrongfully issuing a statutory attachment are in *the position of and liable as tres passers as soon as the attachment is dissolved.*

They are liable in damages sustained by such trespass, though they acted in good faith and in the belief they were entitled to the writ

Handley vs. Chadwick, 109 Ala. 505.
S. C. 19 So Rep., 845.
86 Fed., 223.
28 New York, 666.
27 Mich., 234.
1 Sedgwick, Sec. 59.

Such parties are always liable as trespassers in all cases where the writ has *no judicial sanction, but is issued by a ministerial officer*, when the writ is set aside on the ground that the parties were not by law entitled to it.

Id.

The Clerk of the Court who issued these writs acted purely in a ministerial capacity. (Revised Statutes of Florida, Secs. 1635, 1637, 1641, 1642, 1646. 21 Florida. 189, showing that the clerk issues the writ.)

173 U. S., 85, 95, 96.

The law declares to a creditor "you take out an attachment at your peril. You must have a just demand and some one of the statutory grounds for an attachment, otherwise you will be a trespasser."

And for such a trespass the statute imposes a more extensive liability than that of a common law naked trespasser.

If the creditor, with an execution at law on a final judgment against Smith, had caused it to be levied upon these properties of the plaintiff, his liability would have been that of a trespasser at common law.

In such case, the trespasser would not be liable in *a common law action* to pay the *costs incurred by the owner in other litigation against the trespasser to regain*

possession of the property seized. In the case at bar the statute expressly imposes *such costs on the attaching creditor.* (Rev. Stat. of Fla., Sec. 1646.)

The statute imposes on the creditor the duty to give a bond *agreeing to pay all such costs and all damages sustained in consequence of improperly issuing the writ*; and the bond must be executed by the attaching creditor or his agent, thereby rendering him liable. The penalty of the bond must be *double* the amount of the debt.

The Supreme Court of Florida has construed this statute and the condition of the bond in conformity to the statute *to include costs and attorneys' fees incurred* in obtaining a dissolution of the attachments and other expenses.

Gonzales vs.Tobacco Co., 41 Fla., 471.

For a common law trespass, *there is no such liability.*

And under like statutes in other states and bonds in compliance therewith, the state courts have almost uniformly ruled that the condition of the bond includes not only costs, but attorneys' fees and cost of attendance, and traveling expenses of defendant to obtain the dissolution of the attachment.

In *Gonzales vs. DeFuniak Havana Tobacco Co.*, 41 Fla., 471, the Court in its second syllabus declares as follows: "*Attorneys' fees and other expenses incurred in relation to the attachment or in procuring its dissolution are properly allowed as elements of damage in actions upon attachment bonds,*" citing numerous cases.

Also *Wittich vs. O'Neal*, 22 Fla., 592, in a suit on injunction bond, allowing same element of damages.

Certainly the Supreme Court of Florida has held that the condition of the attachment bond does include

elements of damages for which a naked trespasser is not liable in a common law action of trespass. (41 Fla., 477, supra and numerous cases to same effect.)

The Court of Appeals in this case followed the Supreme Court of Florida in respect to *the elements of damages embraced within the condition of the bond,* so far as the Florida Court has expressed itself. (*L. Bucki and Son Lumber Company vs. Fidelity and Deposit Company,* 48 C. C. A., 436.)

Also reported in 109 Fed. Rep., 393.

And held it was a question of local law which the Federal Courts would follow. (Id.)

"Attachment is essentially the creature of the written law. *Hence, but little assistance can be obtained* in discussing this peculiar remedy by looking beyond the *statute by which it is authorized.* The force and effect of attachment laws can only be tested by the principles of statutory construction." (Id 445, citing Wade on Attachments, Sec. 2; Drake on Attachments, 5th Ed., Section 8.)

"In its nature *this remedy* is certainly anomalous. As it exists under the custom of London, *it has hardly any feature of a common law proceeding.* In these [just mentioned] and other respects the proceeding under the custom has an individuality *entirely foreign to the common law.* The peculiar features have, in the main, been preserved in its more enlarged and diversified development in this country." (Drake on Attachments, Sec. 4.)

And this Court has recently decided that when no Federal element is involved, the elements of damages recoverable on an injunction and attachmnt bond *are questions of local law.*

Tullock vs. Mulvane, 184 U. S., 497.

Railroad Co. vs. Elliott, 184 U. S., 530.

The bonds in question were contracts provided for *and required by the local statute of Florida. They could never have existed but for such statute.* They were executed and filed in actions commenced in the state court (afterwards removed to the Federal Court). The construction of the condition of the bond involves no Federal right or Federal element. If the Federal Court was not bound by the construction given by the local courts, it could not construe the condition of the bond differently. And on points or elements on which the local court has not spoken, the Federal Court is bound to give to the words of the bond such meaning as the Legislature evidently intended, and to effectuate its objects and purposes in requiring such a bond from an attaching creditor.

It is a *remedial statute*, and the condition of the bond *being fixed by the statute*, it should under the settled rule in such case be *liberally construed.* At least, it should be given its natural construction and the well-understood meaning of the words employed should be applied to effectuate the legitimate intent.

Even "*where a statute requiring a bond to be given is silent as to the condition thereof, the condition is to be found in the object and intention of the statute*" and the sureties thereon are liable accordingly.

Mitchell vs. Duncan, 7 Fla., 13.

Attachment laws will be liberally construed: "*whenever by so doing the cause of justice may be advanced.*"

Hardee Co. vs. Langford, 6 Fla., 23.

"In giving a construction to a statute, the Court *must* consider its policy, *and so interpret it as to effectuate the design of the Legislature.*"

1 Fla., 226-232.

"Consequential," as applied to damages, is both a technical and a popular term, and the statute must be

so construed as to give its technical and popular meaning effect.

39 Fla., 25.

"The undertaking (bond) is an original, independent compact on the part of the sureties and must be construed in connection with the statute which authorizes it."

1 Shinn on Attachment, Sec. 173, p. 294; and
Frankel vs. Stern, 44 Cal., 168.

The bond is in every sense *an indemnity bond* and should be construed accordingly.

1 Shinn on Attachment, Section 153.

"The manifest object of the statutes in requiring a person to give a bond before he can have a process for the seizure of his debtor's effects *is to enable the said debtor to have a more certain and effective remedy in the event of the process proving to have been wrongfully* * * * *sued out, than he would have if his only recourse were to a common law action.*"

1 Shinn on Attachments, 153.

"The damages occasioned by the attachment arise *ex contractu*, and may be set off in a suit by the attachment plaintiff" for a debt.

1 Shinn on Attachments, Sec. 182, p. 308.
Citing *Plunkett vs. Sauer*, 101 Penn. St. 356.
Halfpenny vs. Bell, 82 Penn. St., 128, where damages for closing a factory were set off.

The Legislature is presumed to have known the meaning of the words "proximate," "direct," and "consequential," as applied to damages. It chose to use the word "consequence," and has ordained that the obligor on the

bond shall be liable for all damages the defendant sustains in consequence of the attachment. That is, *all actual and compensatory damages*, as dintinguished from vindictive, on account of malice.

Compensatory and actual damages are identical and they should be commensurate with the injury suffered.

Birdsdale vs. Cooledge 93 U. S., 64.
6 Wall., 99.
91 U. S., 298.

One general rule of damages is to award such damages as will make the injured party whole, and place him in the position he would have been in if the injury had not happened.

When this statute was passed, the Legislature is presumed to have known that attachment laws were liable to great abuse, and are sometimes resorted to when there is no proper grounds therefor; and the Legislature intended, by requiring the bond conditioned as required, that its obligors should pay such damages as would make the injured defendant whole and place him *in statu quo*. Hence it made him liable for all damages sustained in consequence of improperly issuing the writ and thereby imposed consequential damages, so far as the latter are distinguishable from "proximate" or "direct." The statute says "*all damages sustained.*" How? By "improperly" issuing the writ. *Not all damages sustained* on condition that the writ is issued maliciously, because vindictive damages are *not sustained by the defendant*, but are given for punishment. All damages sustained, necessarily from the meaning of the words, include all actual and compensatory damages sustained in consequence of the writs.

The only question in each case is, what is the amount and elements of damages sustained as a consequence of the writs?

The Legislature has not limited the damages to such damage as the "Court may award." It has vested in the Courts no discretion on the subject.

Unless violence is done to the language employed and its natural and legal meaning is wrested from it, the obligors *are liable to consequential damages to the extent of all actual and compensatory damages* that can be traced to the writs.

What do consequential damages include?

"All consequential damages are not remote."

But consequential damages may even include remote damages.

1 Sedgwick on Damages, Sec. 110.

"Consequential loss may be one step, or a dozen, in the line of causation from the wrong."

Id., Sec. 111.

Consequential damages include all damages that can be reasonably attributed to the injury complained of though the wrong doer *did not expect or contemplate* such damages.

1 Sedgw., Sec. 112, containing many illustrations

Eten vs. Luyster, 60 Y. Y., 252.

1 Sedgwick, Sec. 125, containing illustrations.

"*Where the plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for loss of business if such loss naturally followed.*"

1 Sedgwick, Sec. 133.

"Thus, for *deprivation* of machinery evidently to be used in a mill, the owner may recover damages caused by the loss of the use of the mill."

Id.

"For instance, wages paid in excess of the work they were able to do."

Id. and *Waters ve. Towers*, 8 Ex. Rep., 401.
130 U. S., 611.
Joly vs. Single, 16 Wis., 280.

"*As for loss of stock on hand*, rendered useless for lack of the machine."

1 Sedgwick, Sec. 133.
Railroad Co. vs. Pritchard, 77 Ga., 412.
VonWinkle vs. Wilkins, 81 Ga.
Sitton vs. MacDonald, 25 S. C., 68.

"Where the plaintiff's vessel is injured by collision, he may recover the amount paid out to the crew in wages during the period of detention."

1 Sedgwick, Sec. 133.
R. R. Co. vs. Mayor, 36 Fed., 716.

The general rule is stated by Shinn as follows: "The attachment defendant may in an action on the bond recover such costs and damages as he sustained *in consequence of such wrongful attachment, by being deprived of the use of his property, together with costs and expenses.*

1 Shinn on Attachment, Sec. 184.

No exception, we think, can be taken as to the correctness of said statement of the general rule. Under it the only question in the case at bar *was the deprivation of the use of the mills a consequence* of the deprivation of the use of its lumber and logs.

In *Etheridge vs. Sperry*, 139 U. S., 277, speaking of the disastrous effects of attachment proceedings, this Court said: *"In ninety-nine cases out of a hundred, the taking possession by a creditor results in closing the business and turning the debtor out of employment."*

It is not untenable to conclude that when the Florida Legislature enacted these attachment laws, it had in view

the well known fact that an attachment levied on all the property of a merchant or manufacturer which he uses in his business generally resulted in destroying the defendant's business, and exacted the broad condition of a bond, to indemnify the defendant against such a disaster.

The Legislature obviously contemplated that very heavy damages might be a *consequence* of such writ, otherwise it would not have exacted a *bond in double the amount* of money for which the attachment was taken out.

It is inconceivable that such a penalty in the bond would have been exacted if the damages could be in the one case only *the value of the personal property taken and never returned, and interest thereon during detention*, and in the other case where the property is returned, only interest on the value during detention.

For the sheriff is authorized to attach only property enough to "*satisfy the debt or sum demanded, with costs.*"

R. S., Sec. 1648.

And it is inconceivable that the Legislature ever contemplated that the amount of interest on the value of the property taken and returned, would ever amount to the sum demanded. In short, if the narrow construction contended for is correct, there could have been no useful object or purpose in exacting security for double the debt; and it will be assumed the Legislature did have some useful purpose in view in exacting such security or indemnity.

BALANCING DISASTERS.

Suppose we arrive at a construction of the condition of the bond *by balancing disaster* of creditor and debtor.

Suppose we say in behalf of the attaching creditor that if such condition of the bond is construed to include all damages resulting from interruption of the business of defendant, *it would deter the creditor from resorting to an attachment*, however well founded his claim or grounds of the attachment.

Well, is it not better and wiser in a given case, on a good claim and on good grounds of an attachment that *one man should be deterred from obtaining an attachment lien as security for his claim*, rather than that in another case, on an unfounded claim and on unfounded grounds, though wrongfully asserted, another man should be encouraged by a construction of the bond to exclude damages resulting from interruption of business, to take out an attachment which will result in the destruction of such business and ruin of defendant, and give him no indemnity or security for his ruin?

The argument is altogether in favor of such construction of the bond as will include damages for interruption or destruction of defendant's business. For on the one hand, by not resorting to an attachment, the creditor *may lose the particular debt by not obtaining a lien as security.* On the other, the defendant or debtor is absolutely ruined and *loses everything he owns*, in case the creditor acts in good faith and malice is not present.

As a choice of evils, the Legislature has chosen the last, and has exacted a bond broad enough in ist terms without *enlarging upon the natural or legal meaning of the language employed*, to include all damages from interruption or destruction of business.

Such considerations should, we submit, persuade the Court to adopt that construction which will protect the defendant *who is equally as innocent as the attaching creditor. And as in all cases of balancing disaster, where two parties are equally innocent, and a loss is sustained, he should bear all the loss whose acts have caused it.*

For the above reason, the authorities holding losses from interruption of business are damages within the condition of the bond, are entitled to the highest respect.

SOME CASES WHERE LOSS OF PROFITS BY INTERRUPTION OF BUSINESS AND LIKE DAMAGES CAUSED BY THE WRITS WERE HELD PROPER ELEMENTS OF DAMAGES IN A SUIT ON THE BOND, AND THE MODE OF PROOF SPECIFIED.

Pollack vs. Gantt, 69 Ala., 373.
S. C., 44 Am., 519.

"One who has been prevented from completing work he had undertaken to do by the attachment of his tools and material, may recover *consequential damages for the injury proved to be sustained.*"

1 Shinn, Sec. 188, p. 327.
Carpenter vs. Stevenson, 6 Bush (Ky.), 259.

And where merchandise in one's business is attached, "the rule that the measure of damages is the difference between the value of the property when seized and the value at the date of the trial *is not applicable to such a case.*"

1 Shinn, Sec. 188, p. 327.
Knapp, Spaulding & Co. vs. Barnard, 78 Iowa 347.; s. c. 43 N. W., 197.

Thus sustaining our contention that the cases of *Watson vs. Sutherland*, 5 Wall., and *North vs. Peters*, 138 U. S., supra, have no application to suits on attachment bonds.

"In Mississippi it is said that loss of business caused by the seizure of goods may be a factor in computing the damages *when the same are shown as a matter of fact, and not by the opinion or estimate of witnesses.*"

1 Shinn, Sec. 190, p. 342.
Marqueze vs. Southeimer 59 Miss., 430.
Byrne vs. Gardner, 33 La. Ann. 6.

Injuries to business are recoverable and were allowed in the following cases:

Flournoy vs. Lyon, 70 Ala., 308.
Oberne vs. Gaylord, 13 Ill. App., 30.
Mayer vs. Duke, 72 Texas, 445.

"Loss through deprivation of means of protection to person or property" is not too remote.

1 Sedgwick on Dam., Sec. 134., and illustrative cases cited.

This is applicable in principle to case at bar, for deprivation of the use of all the lumber plaintiff owned, disabled it to protect its right to operate the mills.

And the decisions of the Supreme Court of Florida, and other cases cited, establish that the rule of damages in a case of a trespass *at common law has no application* and does not control the measure of damages under the covenant in the condition of this bond.

The loss of the use of plaintiff's mills by being deprived of the means of running them, is certainly no more remote, nor so much so, as attorneys' fees and other expenses incurred in obtaining a dissolution of the attachment. The incurring of liability for such attorneys' fees is a more remote and unexpected consequence of the writs than inability to run the mill when all plaintiff's property was levied on.

In view of what the Supreme Court of Florida has decided as an element of damages in a suit on the bond, following the rule in other states allowing attorneys' fees, expenses traveling and hotel bills, in obtaining a restoration of the property, it cannot be doubted that if the question was before it, it would follow those states which allow damages for interruption of business, when proven with reasonable certainty.

Justice will be better promoted by giving to the statute and condition of the bond this natural meaning and thereby give a remedy to plaintiff for its losses, than by giving a narrow and restrictive meaning, and thereby leave the plaintiff no redress.

Decisions of other Courts in suits on bonds cannot furnish much aid; the language of the statute and bond is different. After all, the solution of the question depends on the construction to be given to the condition of the bond, having in view the legislative intent.

The apparent conflict in the reported cases arises from want of discrimination in respect to the facts and *nature of the property in each particular case, and the use* the defendant was making of such property.

Certainly the damages must be different if the writ is levied upon a tract of wild land, unused for any purpose than where it is levied upon a manufacturing plant, and all the crude materials and supplies for feeding the plant, and all the manufactured finished product on hand for sale, constituting all the means and assets defendant owns in the world wherewith to maintain and continue in business.

This marked distinction is indicated in *Elder vs. Kutner*, 97 Cal., 49; s. c. 32 Pacif., 563., when discussing the liability of obligor on an attachment bond in a case of a *levy on land*.

A levy upon a merchant's entire stock of goods in trade, in consequence of which his sales and entire bus-

iness are suspended, directly and necessarily causes greater damages and involves different elements of damages, than a levy upon a dwelling house and lot, where possession and use is not interrupted.

So that the cases cited in the digests and text books, declaring the rule of damages to be applied in case of a levy of an attachment on land, or articles of personal property not connected with an *established business*, are inapplicable to the case at bar.

The Appellate Court in this case found that the attachments had the *"gravest effect"* and *"serious effect on the business of the defendant."*

48 C. C. A., 439.

And for such reasons, among others, that Court held attorneys' fees were proper elements of damages for services in getting the attachment dissolved. We submit that the damages resulting from the mills being idle before the attachments were dissolved, are no more remote than such attorneys' fees.

In 94 U. S., 470, the Court said: "When there is no intermediate efficient cause, the original wrong must be considered as reaching the effect, and proximate to it." Refinements beyond this rule "are too remote for rules of social conduct."

Id. 476.

Insurance Company vs. Boon, 95 U. S., 117-132.

The relation of cause and effect is for the jury.

Id. and 27 Fla., 116, and cases cited.

And in *Derry vs. Flitner*, 118 Mass., 131, the Court said: "A loss through deprivation of means of protection is proximate and is a question of fact."

Therefore, under the above established rules of law, there was *no intermediate efficient cause* and the original wrong of isuing and levying the writs was the *direct* and efficient cause of the loss of the use of the mills and in the language of the statute and of the bond this damage was "damages which the defendant may sustain in consequence of the plaintiff's *improperly suing out* said attachment." (R. S., 1646.)

See bond, Rec. p. 9.

DAMAGES CONTEMPLATED.

It seems to us incontestible that the attaching creditor knew, and this surety knew, that when their attachments were levied, the plaintiff's business *would be immediatey interrupted*, and that such interuption would continue *for an indefinite time*, to wit: *until the lien of the attachments* was finally removed.

The attaching creditor had its principal office in the city of Jacksonville where the plaintiff's mill plant was located. It was daily delivering logs into plaintiff's boom, and having daily business transactions with the plaintiff. The testimony establishes that it knew plaintiff had a large quantity of logs in its boom, for it had itself delivered them there; and it knew that plaintiff *had several times the quantity* of manufacturd product on hand at the mills that it usually had on hand. And it knew the reason of such large accumulation of manufactured product on plaintiff's yards and docks was caused by the inability of purchasers of such product to charter vessels to remove such product; and that plaintiff could not obtain pay for such product until it was loaded on vessels at its docks, for such was a term in the contract with the purchasers, and *this attaching creditor knew it*.

This attaching creditor also knew that the plaintiff had *for several months borne the expense* of buying logs and sawing them , and piling up the finished product in its yards, *without receiving any proceeds from the sale of lumber,* because of the scarcity of vessels to take it to the purchasers; *and that thereby all its accumulations of ready cash in its business had been exhausted.* The attaching creditor knew all these things and those above enumerated facts, *because its officers in the witness box admitted they knew them.* With the knowledge of all such facts, *they struck this direct blow at plaintiff's business, and they absolutely knew that with these attachments* resting on the properties levied on, *it was impossible from want of financial means, for plaintiff to continue in business.*

It is therefore certain that the attaching creditor, The Atlantic Lumber Company, not only contemplated, *but absolutely knew, that these attachments would inevitably cause the total interrupting,* as it did, of plaintiff's business, as long as they could keep these attachment liens for $85,000 upon its properties.

CONTEMPLATION OF DAMAGES BY THE SURETY COMPANY.

Without now insisting that the surety company is chargeable with all the knowledge of the disastrous effects these attachments would have, which the creditor possessed, it is very certain that it did not execute bonds *conditioned as these were* in the penal sum of $170,000 *without making effective inquiry* into its liability, assumed by becoming such surety. It is well known that no business man goes upon such a bond without reasonably accurate knowledge of the nature of the property

to be attached, and its quantity and value, *and the use the owner is making of it.* He naturally inquires, and we think he is bound to inquire, as to the effect the levy of the writs will have on the defendant's business. *The condition of the bond itself* informed the surety company that plaintiff company was a manufacturer of lumber, and *that the writ was to be levied on the lands and tenements, goods and chattels* of the plaintiff company.

See bond, Rec. p. 9.

The defendant had officers in the city of Jacksonville, Florida, where plaintiff's mills were located. This surety company, therefore, is chargeable with knowledge that the goods and chattels of plaintiff, as a lumber company, *consisted of logs and manufactured product,* and that its lands and tenements consisted of its mill plant. Its local officers are, therefore, chargeable with knowledge that the levy of attachments for $85,000 upon such properties would naturally cause a suspension of business, if not its destruction. *Every business man knows it for common sense so teaches.* This surety company knew the nature of the damages that those writs would inflict, and that among those damages would be the loss of the use of its mill for an indefinite period of time; and their officers knew the condition of the bond.

They *contemplated the payment* of such damages within the condition of their bond, and *they knew* the effect of the attachments would cause the loss of all profits of plaintiff's business while such attachments remained on its properties.

It cannot, therefore, be correctly said that the loss of profits was "*incidental*" or a *collateral consequence* of these writs. *It was the direct result of the blow of these writs.*

ADDITIONAL AUTHORITIES SUPPORTING THIS ASSIGNMENT OF ERROR.

In *Y. Y., etc., Mining Co. vs. Fraser*, 130 U. S., 611, one question involved was the liability of a contractor to damages for a failure to erect a new silver mill with efficient machinery at the time agreed upon. In accordance with the familiar rule, it was held, the contractor was not liable to loss of profits expected to have been made during the time lost by non-completion of the mill, because in such case there can be no reasonably certain proof like that of past profits of *an established business*, by which to estimate the profits.

But the Court did hold in that case, that the contractor was liable for the rental value of the mill, and in the absence of other evidence, ruled that "the legal rate of interest upon the cost of the mill may be taken by a jury as its fair rental value."

And this Court, in that case, also ruled that "in estimating damages resulting from the stoppage of a mill, the jury may take into consideration the wages of men thrown out of work while the mill was idle," when the employer was *bound to pay them while so idle*.

In the case at bar, the Circuit Court applied this rule as to salaried employees of the plaintiff, and the Appellate Court sustained it.

This was on the theory that *in consequence* of plaintiff's inability to run the mill, it suffered the loss of the value of the services of the employees, which he had to pay. But the inability to run the mill was a *financial inability*, caused by the writs.

If such inability entitled plaintiff to recover of the surety for the *loss of the use of the services* of its employees, represented by the amount of their salaries

paid, why should not plaintiff recover of the surety for the loss of the use of its mills, represented by the *amount of profits* which the jury could find it might have made, if the attachments had not issued?

If the loss of the use of the services of the employees was the proximate effect of the attachments, as the Court ruled, then it logically follows that the loss of the use of the mills was the proximate effect of the attachments, and in each case it is for the jury to decide the amount of such loss.

The ruling now under discussion, of the Courts below, followed that of this Court in 130 U. S., pp. 611-623.

Certain it is that this Court held, in 130 U. S., 623, that the loss of the use of the services of employees "while the mill was idle" was an element of damages for which the contractor was liable.

And in that case, *the breach of the contract* to have the mill ready for use at a fixed time, was held the proximate cause of the mill and the employees being idle, and of the loss sustained. In that case, such loss of the use of the services of the idle men was deemed to have been in contemplation of the parties.

The loss can not be said to have been more in the contemplation of the parties in the case of 130 U. S., supra, than the loss in the case at bar was in contemplation of the parties.

We confess we are unable to see any distinction in the case at bar, from the loss of the services of the salaried employees, while plaintiff was unable to operate its mills, and the loss of the use *of the mill itself*, and the profits arising therefrom. If the former was caused by the attachments, the latter was.

If anything, *the former is more remote than the latter*. The loss of the men's services was a *consequence*

of the inability to operate the mills, and the inability to operate the mills and earn the usual profit, was a consequence of the attachments. The former was one step more remote than the latter in the line of causation.

RENTAL VALUE OR ITS EQUIVALENT BY WAY OF LEGAL INTEREST ON THE COST OF THE PLANT DENIED THE PLAINTIFF.

Had there been no other evidence (which there was) of the damages caused by the loss of the use of the mill, plaintiff was entitled to the rental value, to be arrived at by giving legal interest on the cost of the plant while it remained idle.

The cost of the plant was proven to exceed $130,000. Rec. pp. 82-96.

The rulings and actions of the Court below deprived the plaintiff from recovering this rental value, because the trial judge, as before shown, refused to submit to the jury the question *whether or not the writs of attachment caused the mill plant to remain idle;* and the Appellate Court, by its silence, affirmed that refusal.

In *Dushane vs. Bendict*, 120 U. S., 631, a vendor of rags *warranted them to be clean rags*, suitable to be manufactured into paper. The vendee was a manufacturer of paper. It turned out that the rags were infected with smallpox, which broke out among the vendee's employees, causing him to run his mill short-handed, in consequence of which he lost *part of the usual profits* in his business.

In an action *involving damages for a breach of the warranty*, this Court (reversing the Court below) ruled that the *smallpox caused the interruption of the vendee's*

business; that the selling of the infected rags as and for clean rags, was the proximate cause of smallpox breaking out *among his employees, and that by breach of the warranty* the vendor was liable for the loss of profits from the interruption of vendee's business.

Id., 636, 637.

In that case, *there was no issue of malice.* That element was not in the case.

The question whether or not the vendor knew the rags were infected with smallpox was made, but this does not lessen it *as authority* that for a wrongful act, causing the interruption of another's business, the wrongdoer is liable for the loss of an established business, thereby caused.

Selling impure for clean rags was an illegal, wrongful act. Taking out attachments for $85,000 was also an illegal and wrongful act.

In *Dushane vs. Bendict,* the evidence was such that the amount of the damages could not be estimated with much certainty, but this Court held it must be submitted to the jury, and that it was error not to submit it.

Id., 647.

The rule we contend for is within the reason of the case of *McAffee vs. Crofford,* 13 How., 447-455, where it was held that *wrongfully seizing* and selling of slaves of a planter *under an execution at law,* pending a growing crop of corn, subjected the wrongdoer to pay for the value *of a crop of corn that the planter might have made* if the slaves had not been taken from him.

We do not see *that the nature of the force applied,* in the absence of malice, is a material consideration.

And what is the difference between the measure of damages of breach of warranty as to quality and the breach of an indemnity bond like the bonds in this case?

If the breach of warranty of the rags rendered the obligor liable for damages for interruption of the mill, why should not a breach of the bonds result in the same liability? It would seem that the liability is less questionable on the bonds, because the obligors have expressly covenanted to pay consequential damages.

In *Allison vs. Chandler*, 11 Mich., 542 (a leading case, never overruled), held, that *as plaintiff had sustained actual damages* by defendant's trespass, defendant was liable for such actual damages, though he acted innocently; that, even in case of doubt, justice requires that the loss should fall upon the defendant *who had caused the injury, and not upon the innocent plaintiff*; and the amount of the actual damages must be submitted to the jury, though it cannot be estimated with much certainty and was "*more or less a matter of opinion.*"

Id., 560-561.

That case involved damages for interruption of business.

In *Bagley vs. Smith*, 10 N. Y., 489, where one partner sued another at law for a breach of a partnership contract *by dissolving the partnership* before the time limited, held: That defendant was liable for *plaintiff's share of the profits* of the business that the firm would have made if the business of the firm *had continued to the time limited*—such profits being provable.

Suppose a surety company had given bond, conditioned to pay all damages that either partner may sustain *in consequence of the other improperly dissolving the partnership before the time limited* in the contract, would there be any doubt that such surety would be liable for the profits lost, to the same extent, as the partner who had wrongfully terminated the contract?

In *Mining Company vs. Humble*, 153 U. S., 540, it was held that the defendant for the act of wrongfully breaching a mining contract, was liable for all profits plaintiff could have made by performing the contract, which could be proved with reasonable certainty. There the objections that such profits were *too remote and were not in contemplation of defendant*, were overruled.

Id., 549, 550.

The Court there cited, and we here cite:

Howard vs. Stillwell & Bierce Manufacturing Co., 139 U. S., 199-206.

Cincinnati Gas Co. vs. Western Siemens Co., 152 U. S., 200.

In 153 U. S., supra, the Court said: "There was no mathematical certainty as to the amount of ore remaining in the mine, yet the question must go to the jury."

Id., 550.

Had the defendant in the case given bond *to pay all damages in consequence of his improperly breaching his contract*, there can be no doubt that the obligor would be liable to pay for such *profits lost by such breach*, as being within the condition of the bond and within the contemplation of such obligors.

Like illustrative cases could be indefinitely multiplied.

Their application consists in this, to wit: A breach of contract is not so aggravated a wrong as the trespass of seizing one's property under a ministerial writ of attachment to which the creditor was not entitled.

The fundamental ground on which, on breach of contract, the wrongdoer is held liable to profits lost on the *unperformed part of the contract*, is that in law he is

deemed to have *consented* to pay such damages, because he is chargeable with knowledge that such damages would ensue from the breach. And here the surety company has expressly consented to pay all damages in consequence of the wrongful act. It must be chargeable with knowledge that *some damages* would ensue, and is therefore chargeable with the knowledge of their extent and that loss of profits of plaintiff's business would ensue, because by inquiring the surety company would have learned it.

The law presumes that one who breaches a contract knows that the other party entered into it and upon its performance with the expectation of making profits, and consequently he is presumed to know that his breach deprives the other party of an opportunity to make such profits.

The defendant company is presumed to know that plaintiff was conducting its mill business with the expectation of making profits, and it is presumed to have known when it executed its bond that the levy of these writs would deprive plaintiff of the opportunity of making such profits. And he is presumed to have understood that the condition of its bond required it to pay for such profits.

The party who wrongfully breaches the contract, is liable for the expected profits, though he acted in the utmost good faith by virtue of the force of the contract. But in the case of an improper attachment the obligor on the bond has expressly *covenanted to pay all damages in consequence* of the wrongful act of his principal, though the latter acted in good faith.

We fail to see any reason why the one should be liable for profits and the other not, providing in each case the profits can be proven with reasonable certainty.

Other Attachment Cases where the suit was on an attachment bond, or a common law suit against the attach-

ing creditor for trespass, (free from malice), *and held defendant was liable for loss in business by its interruptions*

Handley vs. Chadwick, 109 Ala., 505.
S. C. 19 So. Rep., 845.
Birmingham Dry Goods Co. vs. Finley, 26 So. Rep., 138 (Ala.).
Pollock vs. Gannt, 69 Ala., 373.
S. C. 44 Am., 519.
Flournoy vs. Howe, 70 Ala., 308.
S. C. 10 So. Rep., 916.
Doll vs. Cooper, 77 Tenn. (9 Lea.), 576.
Grimes vs. Bowerman, 92 Mich., 258.
S. C. 53 N. W. 751.
Sonneborn vs. Stewart, 2 Woods, C. C. Rep., 603 604. (Reversed in 98 U. S., 187, but not *on this ground.*)
Myer vs. Foyon 34 Neb., s. c. 51 N. W. Rep., 753.
Kyd vs. Cook, 56 Neb., s. c. 76 N. W. Rep., 524, where the subject is reviewed.
Hangen vs. Hochemeister, (114 N. Y. App.); s. c. 21 N. E. Rep., 1046, 1047.
Max vs. Strous, 93 Ala., s. c. 9 So., 88.
22 Fed. Rep., 220. (Tenn.)
Kennedy vs. Meacham, 18 Fed., Rep.

VALUE OF THE USE.

All the authorities hold that *the value of the use of the property seized and taken from defendant by virtue of the writ, may be recovered in an action on the bond.*

2 Sutherland on Dam. (2d Ed.), 512.
2 Sedgwick on Dam., Sec. 682.

Now, the value of the use must vary according to the nature of the property.

In the case at bar, the value of the use to plaintiff *of its logs and timber seized,* was equal to the profits it could have made by operating its mills, for by the use of such lumber and that sawn from the logs levied on, to wit: selling it, *it could have purchased logs with the proceeds and operated its mill.* Such is the very use plaintiff would have made of its lumber, if the writs had not taken it away.

It has also been shown that *deprivation of means of doing a thing is a proximate cause,* and thus the case is brought within this general rule.

The use by any business concern of its assets is to *keep its business going.*

WHAT IS A TAKING?

This question must be answered according to the facts in each case. Even under the law of eminent domain it does not necessarily mean an actual, physical possession. Such acts as have deprived the owner of the use or of the value of the use of real estate, have been held a taking within the meaning of the law, such as the wrongful overflow of one's land. True, the levy of the writ did not remove the plaintiff from its mill plant—land, mill buildings and machinery—buh the *effect* of the levy on the personalty was the same as if it had, for by the loss of the use of the latter, the use of the former was lost. Plaintiff's rights should not be lost by the mere quibble that, technically, it was not physically removed from the mill plant.

PROPOSITION NEVER DENIED.

We submit that there is no conflict in the authorities *upon the principles* involved on these assignments of error.

As shown, there are many reported cases where it has been held that an obligor on an attachment bond, or one in a like situation as to liability, has been held liable for loss of the use of one's property and loss of *profits of an established business. We submit that there is no reported case where that principle of liability has been denied or repudiated.*

On examination, it will be found that when the Courts *have refused to apply the principle,* it was in cases *where upon the facts in the given case the losses* in the business were either incapable of proof with reasonable certainty, or, *from the nature of the case,* such losses were plainly too remote to be a consequence of the wrong done in the given case, or both uncertain and speculative and too remote.

In other words, *no Court has ever held as a universal or general principle, applicable to all cases,* that a surety on an attachment bond, or one holding a like position, could never be liable to damages arising from loss of profits of an established business, caused by the attachment.

The undoubted and long settled general rule is: "that where it clearly appears that the defendant has interrupted an established business from which the plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profit *he makes it reasonably certain he would have realized.*

1 Sedgwick on Dam., Sec. 182. and numerous cases cited in the text and notes of that section.

Sedgwick, in 1st Volume, Section 127, speaking on this subject, on page 184, says: "But on the other hand, where the *cause of action is a direct blow to the credit or trade of plaintiff, the rule is otherwise.* Thus where the defendant agent of the plaintiff in error broke his contract to keep a cash account of 500 pounds to meet drafts of the plaintiff, and in consequence a draft was returned dishonored, he was held liable for the *loss of trade in G., which was consequently suspended and for loss in the general business of the plaintiff, because of his impaired credit.*" Citing the case of *Boyd vs. Fitt*, 14 Ir. C. L., 43.

We repeat, it is all a question of proximate and consequential cause, or a remote cause, in each particular case, and this is for the jury in all cases, unless the injury is so obviously remote that there could *not* be two opinions on the subject.

DURATION OF THE PERIOD IN WHICH DAMAGES SHOULD BE ALLOWED.

In *Corner vs. McIntosh*, 48 Md. Rep., 389, the Court said: "The authorities are *uniform and clear* in maintaining the principle that the natural results of a wrongful act are understood to include all damages to the plaintiff of which such act was the *efficient cause*, though in point of time the damage did not occur until some time after the act was done * * * *that the proof of actual damages may extend to all facts* which extend to and grow out of the original injury, even down to the day of the verdict; the exception to this rule excludes only such facts as not only happened since the institution of the action, but which furnish themselves *sufficient ground for a distinct suit.*"

The above was an act of trespass against a party who

directed the sheriff to levy on property of a third person. The Maryland Court cited, and we cite:

2 Greenleaf Ev., Sec. 268.

Wilcox vs. Plummer's Executors, 4 Pet., 172, 182.

Mayne on Damages, 33-35.

It being undeniable that the plaintiff sustained very large damages by the breaking up of its prosperous business, we submit the Court should be astute and ingenious to discover and apply principles of law that will give adequate redress to the plaintiff; especially so for the plain reason that, unless the defendant surety company is liable for the damages caused by the breaking up of its business, *the plaintiff has no redress at all*, save the uncertain and precarious redress of successfully prosecuting a suit for malicious prosecution of these attachments, wherein the burden would be on the plaintiff to establish to the satisfaction of a jury that the attaching creditor and its officers were actuated by malice and had no probable cause.

POINT OF LAW.

The damages from loss of profits and to credit are *actual damages, and if not recoverable in this action on the bond, they are not recoverable at all in any form of action.*

There is judicial authority for the proposition that the damage by the loss of profits of the business and to credit, cannot in some cases be recovered in a suit on the bond, because they are *a collateral consequence and too remote;* but may be recovered in an action for malicious prosecution.

It seems to us this is illogical.

There are but two classes of damages involved, *actual and punitive.* The former is to *compensate, the latter to punish.*

Damages given on the issue of malice, are *punitive damages,* awarded for punishment to deter like wrongful acts. They depend entirely *on the existence of malice* and want of probable cause, *and not on any other evidence.*

Now, we say, there *is no foundation* in logical reason for dividing *actual damages into two classes,* allowing one class in the absence of malice, and allowing another class where malice is in issue.

The element of malice *does not cause actual damages.* They are caused by *the actual issue and levy of the writs,* whether the creditor is actuated by malice or not.

Such damages are a consequence of issuing the writs; they are neither less nor greater by the absence or presence of malice, and they are *actual damages.* for which the injured party is entitled to compensation. Whether proximate or not to the wrongful act, they are actual damages, as distinguished from *vindictive damages.* or they are not damages recoverable in any action.

Take the case at bar. Profits from interruption of plaintiff's business were undoubtedly lost. Whether the attachments were the proximate cause of such loss, or a remote cause, they were actual damages. If these writs did not cause their loss, but some other intervening efficient cause did cause their loss, then neither the attaching creditor nor his surety is liable therefor *in any form of action,* but the *author* of such other intervening cause is liable.

Some Courts , in an action based on malice alone and want of probable cause, make the wrongdoer pay for actual damages not proximate to the wrong.

That is, they make the liability depend not on the fact that such damages are proximate, *but on the form of the action.* Otherwise expressed, such Courts rule that in the form of action for malicious prosecution, the wrongdoer is liable

(a) For the actual damages, proximate to the wrongful acts or writs; and

(b) For the actual damages *not proximate to the wrongful acts or writs.*

We submit that this is erroneous and that, in an action for malicious prosecution, the wrongdoer is liable only for such actual damages as are proximate to or consequential of the wrongful act, *and which can be recovered in an action* without the element of malice, or on his bond in an attachment case, *and vindictive damages.* To hold the initial wrongdoer liable to actual damages, collateral to the initial wrong, if the action is for malicious prosecution and for which he is not liable in a form of action where there is no issue of malice, seems to be wrong, incosistent and logically untenable.

To illustrate: In some jurisdictions the jury are instructed and required to state in their verdict, separately, the amount of the actual damages they find and the amount of the vindictive damages they find. Now suppose in a case for malicious prosecution against the creditor, the jury should return a verdict as follows: "Actual damages caused by the writs, $20,000; vindictive damages, $60,000, of which $40,000 *are for actual damages collateral to the writs, for loss of profits.*" Would the present state of the law authorize the Court to render a judgment on such a verdict, including the said $40,000?

If not, then in no form of action could plaintiff recover said $40,000 for loss of profits, *unless it can be recovered in an action on the bonds;* for on the theory stated in an ordinary action of trespass at common law against the attaching creditor, such damages are not recoverable.

It is submitted, the correct rule applicable to the case at bar is to hold the defendant company liable for all damages which a jury find would not have occurred if the writs had not issued, and which can be proven with reasonable certainty. Plaintiff was entitled to such an instruction to the jury.

DAMAGES FROM LOSS OF CREDIT CAUSED BY THE ATTACHMENTS.

It has already appeared that the trial judge refused to submit to the jury the question of damages sustained from the loss of credit, caused by the attachment. To such refusal the plaintiff excepted and assigned error.

See assignment of error Nos. 3 and 10 (Rec. pp. 33-37), and exceptions (Rec. pp. 120-124).

And we now assign error in this: that the Appellate Court erred in not sustaining the said assignment of error.

INJURY TO CREDIT.

These assignments raise the question whether injury to the credit of plaintiff as a *direct effect of the blow of the attachments is a distinctive element of damages for which the defendant is liable.* (Exceptions pp. 120-124.)

It is true the Court below did not necessarily rule that such injury to the credit was not a proper element of damages. The Court took that question also from the jury on the theory already discussed, that the common law suits and refusal to deliver logs after September 30th by The Atlantic Lumber Company contributed to such injury to credit, and that the jury could not separate such injury from the injury to credit caused by the attachment, and therefore took the question from the jury. (See Assignment 24, Rec. p. 44.)

It logically follows that the Court could not consistently give the instructions requested and embodied in the assignments numbered 3 and 10, which were the converse of the 24th.

The instruction requested , stated in assignment No. 3, raises the question of injury to credit as a distinct element of damages. No. 10 raises the question of injury to credit, as a consequence of taking plaintiff's assets from it as a means of doing business.

It is also true that upon the case made, by the evidence, it was not necessary, perhaps, to claim damage *for general and indefinite injury to credit, but only such injury to credit as was caused in combination with placing a lien upon all the assets of plaintiff and thereby taking them from plaintiff as a basis of credit.*

See on this distinction, *Stewart vs. Sonneborn*, 2 Woods, 603, 604.

But as in case of reversal the question may arise in another trial, we may be pardoned for placing before the Court the result of our researches on this important subject.

We have no decision by the Supreme Court of Florida upon this point.

Many cases can be cited where in an action on an attachment bond, damage to credit was not allowed. But a careful review of those cases will establish in nearly every instance the attachment was levied on real estate, either unimproved, or, if improved, not connected with an established business of defendant in attachment; or the business of such defendant was not interrupted; or, if interrupted, it was of such a character or for such a brief interval of time that damage to credit would be inappreciable and wholly speculative. That is, there was no data by which such damage could be measured.

But where defendant's established business had been interrupted for any considerable time, or where the wrong is a direct blow to credit, damages to credit have been allowed, and the question submitted to the jury.

The following are cases cited in the text books to

support the proposition that damages to credit *are generally too remote; not always too remote.*

Petit vs. Mercer, 8 B. Mon., 51 (1847).
Reidhas vs. Berger, 8 B. Mon., 160.
Holliday Bros. vs. Cohen, 34 Ark., 707.
The State to the Use of Roe vs. Thomas, 19 Mo., 613.
Offut vs. Edwards, 9 Rob. La., 90 (1844).
Campbell vs. Chamberlain, 10 Iowa, 377 (1860).
Mitchell vs. Harcourt, 62 Iowa, 349.

In *McFarland & Dupre vs. Lehman, Abraham & Co.,* 38 La. Ann., 351, the Court said:

"Considering the open and honest dealings of plaintiffs and their faithful efforts to pay their creditors at every sacrifice, communicated to all interested, and to defendants themselves, the latter's proceedings by attachments on the charge of fraudulent intent, was peculiarly injurious and insulting to plaintiffs, and substantial damages are allowed therefor."

In *Kaufman & Range vs. Armstrong,* 74 Texas, 65; s. c. 11 S. W. Rep., 1048, the Court said:

"Insolvency constitutes no ground for attachment, and *it cannot be shown in excuse or mitigation of the act of procuring an attachment.* In actions for wrongfully suing out an attachment when no malice is alleged, evidence of loss of credit is not admissible, but when the proceeding is alleged to have been malicious and exemplary damages are claimed, such evidence is generally admissible."

There the attachment was on a stock of goods.

Shinn on Attachments cites *Holliday vs. Cohen,* 34 Ark., 407, as supporting the proposition that injury to

credit is not allowable; but the same author, in his first volume, p. 343, cites the same case in support of the proposition that damages for injury to credit are allowable in case the writ is *maliciously sued out.*

If there can be any distinction between injury to credit with malice and without malice, we are unable to comprehend it, as in either case *the question of compensatory damages is entirely separate and distinct from vindictive damages;* and cites *State vs. Thomas,* 19 Mo., 613, to the same effect.

In 1 Shinn, Sec. 379, numerous cases are cited to the point that plaintiff may recover full compensation for loss of credit, breaking up of business and loss of customers, resulting from the wrongful and *malicious attachment.*

All the text writers and decisions of the Court uniformly hold that where, in a case *of malicious attachment,* injuries to credit are sustained, they may be recovered for.

1 Shinn, Sec. 379.
Lawrence vs. Hagerman, 56 Ill., 68.
75 Texas, 278, 12 S. W. Rep., 986.
Kaufman vs. Armstrong, 74 Texas, 65; s. c. 11 S. W. Rep., 1048.

The latter being a case of attachment of a merchant's goods.

Marx vs. Strauss, 93 Ala., 453; 9 Sou. Rep.,818.
Bradley vs. Borin, 53 Kan., 628; s. c. 36 Pac. Rep.
Petit vs. Mercer, 8 B. Monroe (Ky.), 51.

Which latter case is cited by Shinn as holding that without malice injury to credit cannot be compensated.

McFarland vs. Lehman, 38 La. Ann., 351.
See 2 Woods, 559, by Justice Bradley.
Wheeler vs. Hansen 37 N. E. Rep., 382 (Mass.) decided in 1894.

Shinn on Attachment, Vol. 1, Sec. 188, p. 327, says: "The value of the property or the injury to credit is not an item of recovery when the attachment *defendant has not been dispossessed.*"

Citing *Groat vs. Gillespie*, 25 Wend., 383.

In that case, attachment was levied upon a shanty and some trifling articles of personal property. The shanty was *unoccupied* at the time of the levy, and the property was in nowise interfered with other than by the making of the levy. Nothing whatever is said in the case about injury to credit, nor is the word "credit" used in the opinion.

The author also cites *Heath vs. Lemp*, 1 Cal., 410.

In that case the levy was made upon real estate alone, no personal property being taken. The defendant was not disturbed in his possession or in his business connected therewith.

There was no possible ground to claim any damages to credit.

Elder vs. Kutner, 97 Cal., 49; s. c., 32 Pac. Rep., 563, is also cited as a case where damage to credit was not allowed.

In that case the attachment was levied on unimproved land. No personal property was taken. In a suit on the attachment bond, the plaintiff claimed that between January and August of the year in which the attachment was pending, he desired to borrow quite a large sum of money; that he could not borrow it on the land under the lien of the attachment, because the attachment lien created a cloud on the title, and consequently he had to sell some mules or horses to raise the money; and thereupon he claimed damages to his credit. Obviously, in that case the damage to credit was so vague and indefinite that there was nothing by which the jury could estimate the

damages, and consequently the Court held that damage was too remote; but the Court there distinctly declared as follows:

"There is a marked distinction between cases in which personal property is attached and taken into the possession of the sheriff, and those in which real estate is taken; and when we say the damages *sought to be recovered are too remote for recovery on the bond, we must be understood as applying the remark to cases involving real estate only.*"

No business of defendant in attachment was disturbed in either of said cases.

Seattle Crockery Company vs. Haley, 6 Wash., 302, s. c. 33 Pac. Rep., 650, is also cited by the text books to support the doctrine that injury to credit is not a proper item of damages.

In that case, the writ of attachment appears to have been levied on a stock of crockery. It was dissolved within *six* days after the levy was made, on the ground that the attachment was improperly issued.

The Court below instructed the jury that they could allow damages to credit. The case was reversed on other grounds, but the Supreme Court discussed the subject of injury to credit in that case, and analogized it, whether correctly or not, to an ordinary suit on a promissory note, saying that it was injurious to the credit of any man to be sued even on a promissory note. All the Court said on the subject was purely dicta, and cannot be deemed authority.

The better expression would be, there were no data or facts upon which a jury could estimate it.

Shinn on Attachment, p. 366, cites *Pettit vs. Mercer* 8 B. Mon., 51 (Ky.), to the proposition that damages for injury to credit are recoverable, but the same author in

Section 356 cites the same case to support the proposition that damage to credit is recoverable in case the attachment is maliciously sued out; yet, obviously, there is no difference as to *compensatory damages* between a malicious attachment and one where malice is absent. In either case, it is the actual *compensatory damages* for wrong done that is recoverable; and in case of malice, *punitive damages* are in addition to the actual damages.

There can be, and are, in law but two kinds of damages: *compensatory*, for wrong done; and *punitive*, as punishment; except, of course, there are other classifications of damages, such as liquidated and unliquidated.

Sedgwick on the Measure of damages, Vol. 1, p. 183 Sec. 127, says:

"Loss of credit or custom involves the *intervention of the will of strangers, and is therefore generally remote.* Thus in the case of a wrongful attachment no compensation is allowed *for loss of credit;*" and cites:

Lowenstein vs. Monroe, 55 Iowa, 82.
Marqueze vs. Sontheimer, 59 Miss., 430.
Weeks vs. Prescott 53 Vt., 57.

To sustain that proposition.

He also cites *Pollock vs. Gannt*, 69 Ala., 373, and *MacVeagh vs. Bailey*, 29 Ill. App., 606, to the contrary.

But it is a question for the jury in a proper case to determine whether the taking away of all the assets of a corporation would not influence the will of persons not to credit those to whom, with all such assets in possession and unencumbered, they would probably have given credit.

Weeks vs. Prescott, 53 Vt., 57.

Drake on Attachment, Sec. 175, says:

"*Remote or speculative damages*, resulting from in-

juries to credit, business, character or feelings, cannot be recovered;" and cites:

Reidhar vs. Berger 8 B. Monroe, 160.
State vs. Thomas, 19 Mo., 613.
Holiday vs.s Cohen, 34 Ark., 707.
Campbell vs. Chamberlain, 10 Iowa, 337 .

To support that proposition, the author also cites some Alabama cases, but it is shown later on that damages for injury to credit *are recoverable in Alabama,* in cases where there are data and facts upon which it can be estimated.

It it thus shown that our proposition is maintained to wit: *That neither the text writers nor any Court has ever held that under no circumstances can damages for injury to credit by wrongful attachment be recovered.* They only hold that where the attachment is on real es tate, and the defendant is not disturbed in his possession or his business disturbed, the damage is too remote, there being no data from which it can be measured.

The only case where the stock of goods was levied upon, where it was held that damages for injury to credit could not be recovered, when suffered *during the pendency of the attachment* is the case of *Seattle Crockery Company vs. Haley,* supra, where the defendant was de prived of his stock of goods for only *six* days, and the Vermont case above referred to, where the possession of the goods was interrupted for only *forty-eight hours,* and the Iowa case, where injury to credit was claimed *for a time after attachment ceased.*

Notice that the Florida statute requires bond to pay all damages sustained, in consequence of *improperly issuing* the attachment (whether levied on or not). Although damage from issuing without a levy of the writ

is damage to credit, we think *the distinction is worthy of consideration.*

The following are cases where damages for injury to credit have been allowed:

Myer vs. Fagan, 34 Neb.; s. c. 51 N. W. Rep., 753, where the attachment was on a merchant's stock of goods, and where the Court held that injury to credit was a proper element of damages to be considered.

In a recent case, *Kyd vs. Cook,* 56 Neb.; 76 N. W. Rep 524, this subject is carefully reviewed as late as 1899. A stock of goods consisting of furniture and undertaking goods was attached. The Court gives its reasons at length for sustaining the rule that injury to credit is allowable In that case, the sheriff took possession of a stock of goods, removed them from the defendant's place of business, and the averment of the declaration was, "closed up the plaintiff's store and locked the same, and kept the same closed up and locked, and remained in possession thereof for a period of *ten* days."

The Court reviews the authorities cited to sustain the proposition that damages to credit were not allowable, *and holds that they are not applicable, and cites in its opinion to support the allowance for damage to credit the following cases:*

51 N. W. Rep., 753, another Nebraska case.
Lewis vs. Taylor, (Texas Civil App.), 24 S. W. Rep., 92.
Hangen vs. Hochemeister (N. Y. App.), s. c. 21 N. E. Rep., 1046.
57 N. W. Rep., 1010.

The Supreme Court of Nebraska, in the case of *Kyd vs. Cook,* supra, said:

"Another argument is that loss of credit was not a proper element of Cook's damages; that this element was too remote and speculative for consideration. This is simply to say that the wrongful destruction of or injury to a merchant's credit is one for which the law affords no redress. *We cannot subscribe to this doctrine. A man's financial standing or credit may not be 'property' within the technical meaning of that term, but it is some thing often more valuable;* and if it be wrongfully injured or destroyed by another, he may recover whatever *pecuniary damages he can prove by competent testimony, under proper pleadings, he has sustained thereby.*"

76 N. W. Rep., 526.

The case of *Hangen vs. Hochemeister,* 21 N. E. Rep., 1046 (s. c. 114 N. Y., 566), was for damages for attachment levied upon bar fixtures, gas fixtures, water fixtures, tables, chairs and other property in a saloon, and for breaking up and injuring plaintiff's business, reputation and credit. It was contended that there was no averment in the declaration under which the damages to the business and credit could be proven.

The New York Court of Appeals, 21 N. E. Rep., p. 1047, says:

"But such damages were claimed in the complaint It was alleged that the taking of the property broke up injured and destroyed the plaintiff's business, reputation and credit, by which he suffered damages."

ALABAMA CASES.

In Alabama, in the following cases injury to credit by attachment of personal property, being stocks of goods and assets of one engaged in mercantile business, has been sustained:

Flournoy vss. Howe, 70 Ala., 308; 10 Sou. Rep., 916 where it is stated how such injury to credit may be proven

Pollock vs. Gannt, 69 Ala., 373; s. c. 44 Am. Rep., 519, which was an action on an attachment bond. That case also states how damages to credit may be proven. And the late case of *Hondley vs. Chadwick,* 109 Ala., 505; s. c. 19 Sou. Rep., 845.

In this case also there was an attachment of a stock of goods, and the subject of injury to credit is again reviewed and allowed.

Birmingham Dry Goods Company vs. Finley, 26 Sou Rep., 138, is a late case in point where damages to credit was allowed.

In 1 Shinn on Attachment, pp. 343, 344, case of *Doll vs. Cooper,* 77 Tenn. (9 Lea) 576, is cited to support recovery for injury to plaintiff's credit, where he was thrown into bankruptcy by the attachment.

22 Fed. Rep., 220, where damages for injury to credit by attachment were allowed, was in the Federal Court in Tennessee, and there is no statutory law cited that influenced the Court in its conclusion.

In that case, by the effect of the attachment, the defendant was deprived of his laborers, who became frightened, and went away, *and he could not have been damaged by that if he could have had sufficient credit to employ other laborers.*

Also in 18 Fed. Rep., in the case of *Kennedy vs. Meacham,* and others, the injury to credit was considered a proper element of damages to submit to the jury, and was submitted under circumstances of the case, rendering his credit peculiarly sensitive to injury by the attachment,

and the Court, in its opinion, charging the jury, *defines what credit is, and its value to a merchant.*

In *Doll vs. Cooper,* 77 Tenn. (9Lea), 576, the Court says:

"The measure of damages for wrongful suing out of an attachment is (1) *loss by injuring, detaining, or converting the property attached; all loss by injury to plaintiff's business sand credit,* as where plaintiff is thrown into bankruptcy by the atachment; (2) vindictive damages, based on the falsity or malafides of the claim, wanton abuse of process, or express malice in suing out, levying and continuing the attachment. And these three elements of damage constitute the recovery in an action on the attachment bond as well as in the action at common law."

The above-mentioned case classes injury to credit as an actual damage.

Grimes vs. Bowerman, 92 Mich., 258; s. c. 53 N. W., 751, is a valuable and late case, where injury to credit was allowed, *as well as all losses from interruption of business.*

In *McVeagh vs. Bailey & Howford,* 29 Ill. App., 606-615, which was an action for improperly closing the plaintiff's place of business by a levy of an execution instead of levy on real estate, and the levy was quashed on motion, the Court said:

"The jury also has the evidence as to the manner and extent of damage to the goods, and of the injury to the credit of appellees. Accordingly, we see no reason to hold that the damage assessed was excessive, but we hold that the evidence appears to have warranted the damages as assessed."

In *Sonneborn vs. Stewart*, 2 Woods Rep., 603, 604, Justice Bradley, in charging the jury, expressly said:

"Damages are to be allowed to the plaintiff for the breaking up of his business and *destruction of his credit.*"

And later on: "It has been claimed that destruction of the plaintiff's credit is a distinct item of damage; *but perhaps this is to be considered as incorporated with his business and the injury thereto, as included in the damage for breaking up said business. The jury will judge whether any separate allowance should be made therefor.*"

It will thus be seen that damages were allowed for injury to credit, *even where the writ was issued by the Court as a judicial act*, and not where, as in the case at bar, the writ was issued by a ministerial officer without any judicial proceeding.

That case went to the Supreme Court of the United States and is reported in 98 U. S., 187, where it was reversed on the ground of error of the Court in its charge to the jury *upon the subject of what probable cause consisted of.*

In that case the Supreme Court and counsel for the appellant at least conceded indirectly that injury to credit was a proper element of damages, for counsel did not except to the charge of the Court below as to injury to credit, nor was it noticed in the opinion of the Court.

In I Sedgwick, Sec. 127, p. 184, after saying loss of credit or custom generally involved the intervention of the will of strangers, and is therefore generally remote, says that, on the other hand, where the cause of action is a *direct blow* to the credit or trade of defendant, the rule is otherwise; thus where the defendant who was the agent of the plaintiff in G., broke his contract to keep a cash account of five hundred pounds to meet the drafts

of plaintiff, and in consequence a draft was returned dishonored, and he was held liable for loss of trade in G., which was consequently suspended, and for loss in the general business of the plaintiff because of his impaired credit; citing two English cases.

In I Sutherland on Damages, Sec. 77, the author says:

"A banker may be liable for damagess not measured by interest for refusing to pay a check of his customer who has provided funds subject thereto. The credit of the drawer is likely to be injured by such refusal."

And the author cites the case of *Prehne vs. Royal Bank of Liverpool*, 5 L. R. Ex., 92, and other English cases, to support that proposition.

The author cites one case where the plaintiff recovered two hundred pounds for injury to his credit for not paying a check of forty-eight pounds.

The author also cites numerous American cases among others:

Schaffner vs. Ehrman, 139 Ill., 109; s. c. 28 N. E. Rep., 917, where a verdict of $450 was sustained for a *mistaken refusal* to cash checks amounting to $900.

Can it be possible that injury to credit for failure by a bank to pay a check is any more serious or appreciable than the taking by writ of attachment of all of the plaintiff's property out of its possession, and maintaining the lien of the attachment for nearly two years, and thus deprive it of all means of credit?

Certainly the notoriety of the levy of such a writ, which always goes into the newspapers, is incomparably greater than the failure of a bank to pay a check, where the refusal to pay it would certainly not be circulated by the bank, and would be known only to the holder of the check, and unless such holder reported it to the newspa

pers, the circulation of such report of such protested check would be slow and confined to those to whom the holder of the check wilfully or casually mentioned it.

In the case of *Blair vs. Kinch* 10 L. R. Ir., 234, damage to plaintiff's credit was recovered upon the following facts: Defendant had agreed not to take judgment against the plaintiff in a certain case except upon the happening of a stipulated condition, the reason being that the plaintiff was desirous of *avoiding the publication of the attachment in a certain commercial journal,* for fear that it might injure his credit. Defendant broke his contract, took judgment, and publication was made, and plaintiff brought his action therefor.

8 Am. & Eng. Enc. of Law. (2d Ed.), p. 634.

The case of *McAffee vs. Crawford,* 13 How., 447, cannot be sustained except on the theory and basis of loss of credit, which we contend for in this case. *In that case the wrongful act took away from his possession the slaves and laborers of the plaintiff, and he was allowed to prove and recover damages as follows:*

First—For the loss of cord wood which was carried away in the river by a sudden storm; and

Second—For the loss of a crop of unmatured corn which would have matured and been gathered if his slaves and laborers had not been taken from him. He still had his plantation left as a basis of credit.

Now, it is perfectly evident, or at least proper to assume that the plaintiff could have employed other laborers, if he had had the credit or means with which to do it. His losses arose from want of labor, taken from him, and certainly it was his duty to have employed other

labor, if he could. The inference is, that he had not the means to do it with, which supports our contention that no man is bound to have credit or money in bank with which he can carry on business, when all the property and assets engaged in the business and upon which he relies, are taken from him. And in that case the plaintiff still had his plantation left as a basis of credit, and without any lien of an attachment on it, as in the case at bar.

We have not found, and do not believe that there is any case where it is held that damages for injuries to credit cannot be recovered in a *malicious attachment*. The rulings of all the Courts are harmonious upon that subject, so far as we have discovered, and some of them hold that the only way to recover damages for injury to credit is by an action on the case for malicious attachment.

Some of them holding that to be the only way are cited in I Shinn, p. 343:

Holiday vs. Cohen, 34 Ark., 707.
State vs. Thomas, 19 Mo., 613.
82 Ill., 545.
52 N. W., 751, Michigan case.
Willis Brothers vs. McNatt, 75 Texas, 69.
S. C., 12 S. W. Rep., 478.

There is certainly no reason for the contention that upon a state of facts such as the bill of exceptions discloses, injury to plaintiff's credit should not be an element of damages to be submitted to the jury.

Obviously its credit was injured. Attachments for $85,000 must inevitably have injured its credit.

While we do not claim the defendant surety was liable for vindictive damages, still the fact remains that the attachments were an outrageous wrong and injustice. They would at once produce the impression among the

28th ASSIGNMENT OF ERROR.

(This assignment is at pages 48 and 49 of the Record.)

It is for the Court's remarks to the jury in the following words, to wit: "*A party has a perfect right to sue out an attachment by becoming liable to pay all damages; there is no law against it; it is not a tort; but he becomes responsible to pay all damages from the issue of the writ.*" (Exception, Record p. 134.)

Such language from the Court was calculated to produce a wrong impression on the jury, to mislead them and divert their minds from the real questions before it. It was equivalent to saying that "levying an attachment for unliquidated damages and interrupting or destroying one's business is of no consequence at all, provided a bond is given to pay damages." Such an impression was injurious to plaintiff.

Under the laws of Florida, no one has a right to an attachment by simply giving a bond. Issuing an attachment not based on ground specified in the statute, is a tort. It is not a contract; it is not a legal crime (it is a moral crime); and must be a tort, for these three classes embrace all the laws of the land.

The Florida statute provides that before an attachment can issue,the creditor must make an affidavit stating the amount of the "debt or sum demanded, and that the same is actually due.' A false affidavit would be a serious tort.

Rev. Stat., Sec. 1642.

No attachment lies under the language of that statute, based on the theory that by continuing to perform a contract of the character between these parties, profits to the amount of $75,000 would have been realized.

No such case was ever brought in Florida, at least such a case was never before the Supreme Court.

The legal profession, and judges in that state, have always construed that statute to mean that a fixed, definite and certain sum was due, or was capable of being calculated with reasonable certainty from the terms and data contained in the contract itself.

To that effect are the decisions in all the states where the statute uses like or similar words to those of the Florida statute.

The sum sworn to must be so definite or capable of being calculated with such definite certainty that the affiant can conscientiously swear that the sum stated is actually due. It is so held in the following cases:

Drake on Attachment (6th Ed.), Secs. 13 to 23.
Clark vs. Wilson, 3 Wash.,C. C. Rep., 560.
Jeffrey vs. Wooley, 5 Halst. (N. J.), 123.
Barbour vs. Robson, 3 Green (N. J.), 17.
Hazard vs. Jordan, 12 Ala., 180.
Brown vs. Hay, 1 Harr. (N. J.), 157.
Wilson vs. Lewis Cook Mfg. Co., 88 N. C.
Price vs. Cox, 83 N. C., 261.
Palmer vs. Bosher, 71 N. C., 291.
Hecksher vs. Trotter, 48 N. J.
Cheddick vs. March, 21 N. J.
Hoover vs. Hathaway, (1893) 20 D. C., 591.
25 Fed. Rep., 594.
Dun vs. Mackay, 22 Pac. Rep., 64; 65 Cal.
Warwick vs. Chase, 23 Md., 154.
5 Halst. (N. J.), 123.
Corland & Bierne vs. Cunningham, 37 Pa., 228 232.
Hugg & Bell vs. Booth & Foster, 2 Ired., 282.
5 Ired., 374.
1 Dev., 189.

6 Mackay, 221.
Hockstadder vs. Sam, 11 S. W. Rep., 408 (Tex.).
S. C., 73 Tex., 315.

This latter case, under a statute substantially like the Florida statute, held that attachment would not lie for unliquidated damages arising from breach of contract.

The Florida statute requires the debt, or sum demanded, to be sworn to *positively, not on information* and belief. Rev. Stat., Sec. 1642.

In *Clark vs. Wilson,* 3 Wash., C. C., p. 564, the Court said: "This then, is a case in which liquidated damages are demanded; in which the contract alleged as the cause of action, affords no rule for ascertaining them; in which the amount is not and cannot with propriety be averred in the affidavit, and which is, and must be, altogether uncertain until the jury have ascertained it; *for which "operation no definite rule can be presented to them."*

Justice Washington, who pronounced the opinion in this case, has been followed in all cases above cited, all of which directly apply.

In *Zinn vs. Dzialynski,* 13 Fla., 600, the Court said: "It is required, of course, that the indebtedness must be actually due, that is, *that the day of payment had arrived according to the contract,"* from which the implication is certain the writ would not lie for unliquidated damages.

The attachment for $75,000 was sued out on a claim that The Atlantic Lumber Company could have made that sum of money as profits by performing its contract to deliver logs for three years and a half, the unexpired period of the contract.

See contract, Rec. p. 90.

In the language of the opinion in 3 Wash., supra, and the California case, supra, the claim is attended with too many contingencies, uncertainties and fluctuations of the market for any man to conscientiously swear that a particular sum is due.

The Court below, by its own charge to the jury, made this a material question; and we respectfully solicit this Court to treat the question as a material one and pronounce its judgment upon it.

It certainly is a subject of supreme and transcendent importance to every citizen, and may enter into another trial.

If the charge was not pertinent and was uncalled for, still this we submit is no reason why it should not be corrected if erroneous. The charge tended to belittle the case in the estimation of the jury. . .

It could hardly fail to have an effect upon the jury prejudicial to plaintiff's interests. The jury should have been told that there was no right to an attachment for such unliquidated damages, and the defendant could have known it by proper inquiry.

We repeat, such a charge must have made an impression upon the jury that was most damaging to plaintiff. It tended to produce the impression that the case was of small importance. Especially so in connection with another charge already discussed, that the defendant as a surety was only liable to such damages as was proven by *"direct"* and *"positive"* testimony.

There was no right under the statute to the writ, and The Atlantic Lumber Company was a trespasser *ab initio* and defendant's liability was commensurate with that of The Atlantic Lumber Company and proven by the same testimony, and testimony of the same character as to certainty.

The charges and instructions given and refused established that the Court below had a most erroneous conception of the law of the case.

36th ASSIGNMENT OF ERROR.

(Record, p. 52.)

This is for excluding from the jury the testimony of Rothero, the book-keeper of the Dagnon-McLean Construction Company. (Exception, Rec. pp. 93, 94.)

One item of damages claimed in the declaration and bill of particulars was charges to plaintiff of the difference between lumber sold by plaintiff to that company which the latter bought, the delivery of which was prevented by the writs of attachment.

(Rec. pp. 22, 23.)

The witness had sworn he made entries in the books, copies of the items of the charges in the books were taken before the commissioner; witness testified they were correct as given to him by the employee having charge of that branch of the business; that the charge was made and the bill made out in the presence of plaintiff's representative.

See Testimony (pp. 91 to 94).

The Court excluded the testimony after it had been read, on the ground that the witness, *the book-keeper, did not have personal knowledge of the transaction attended to by another employee in the usual course of business.* (Rec., p. 94.)

Under the laws of Florida, such testimony was admissible.

Revised Statutes, Sec. 1120.

17 Fla., 461.

It must be observed that *the defendant* examined this witness before an officer in New York, and the *plaintiff read his testimony on the trial.* The Court excluded it on the ground that the witness himself *did not buy the lumber to supply the deficiency.*

To exclude the testimony on the ground that it was excluded, would make the books of every business concern valueless as evidence.

It is impossible that any book-keeper can know that the amount of sales or other transactions of every salesman or employee or clerk, is true. Done in the usual course of business and contemporaneously entered in the books by one whose business it was to do it, the entry is prima facie admissible and presumed to be correct.

A business of any magnitude cannot otherwise be conducted. It would be impossible to produce every salesman, or other employee, who after the lapse of time are scattered to the four quarters of the world. *The ruling of the Court was prejudicial, as it excluded proof of damages of over* $4,000.

ORIGINAL ENTRIES.

No objection to the books was made on the ground that they were not books of original entry. Such an objection was not made and could not be made.

The defendant examined the witness as its own, and itself put copies of the book in evidence. Defendant chose not to read and the plaintiff did read it to the jury; and defendant cannot now raise on appeal for the first time, any objection other than those raised in the Court below.

This rule is fundamental.

37th ASSIGNMENT OF ERROR.

This assignment is at pages (52 and 53) of the Record.

This is for striking out the portions of the declaration claiming as damages "traveling expenses of the officers and agents of the plaintiff in attending Court and preparing for the motion to dissolve the attachment." (Rec. pp. 21-25.)

Now it is a question for the jury to decide what damages are the direct and proximate results of the writs. If traveling and hotel expenses of the officers and agents of the plaintiff company were caused by the writs in an effort to prepare for, and on the trial of a motion to dissolve, then they come directly within the condition of the bond, for they are a consequence of the writs.

Striking out such parts of the declaration necessarily prohibited plaintiff from proving such damages; and of having the question submitted to the jury.

The bill of exceptions shows that the principal officers of plaintiff were on duty at their offices in New York City when the writs were levied. (Rec., pp. 99, 100.)

Such damages are legal damages to be allowed and the action of the Court was prejudicial error.

1 Shinn on Attachments, 320.
18 Fed. Rep., 311.
34 Fed. Rep., 474, 475.
38 Fed. Rep., 311-317.

Such damages come directly within the rule of the Supreme Court of Florida in the late case of *Gonzales vs. Tobacco Co.*

41 Fla. Rep., p. 471.

NEWSPAPER PUBLICATIONS.

The Court struck out that portion of the declaration averring publication of the attachment proceedings in newspapers. (Rec., pp. 21-25.)

Every one knows that in case of an attachment in such a case and for so large an amount, the newspapers will publish it, and the obligors on the bond knew it would occur in the ordinary course of events.

The greater the publicity, the more immediate and widespread is the injurious effect of the attachment upon the debtor's credit and business.

It comes within the rule of direct and proximate cause. It is not an independent efficient cause, but a cause produced naturally and in the ordinary course of things, in modern civilization where newspapers exist.

See 118 Mass., 131.

It has been pointedly ruled that the publication of notices of the attachment may be properly put in evidence for the purpose of showing injury to business and credit.

Brandt vs. Hinchinson, 68 Mich., 590.

Waples on Attachment (2d Ed.), 1012.

Manifestly if the attachment proceedings were known only in the immediate neighborhood of the debtor's business, his damage would be much less than if known throughout the large commercial cities of Baltimore, New York and Boston, where the plaintiff did business.

We submit that the Court below took a too narrow view of the consequences of such a blow as this attachment was. This narrowness of view is seen throughout its entire rulings, refusing to give instructions to and to explain to the jury the nature of the case, and their duties in the premises; and said rulings tended directly to

largely reduce plaintiff's damages below what it was entitled to recover and actually sustained. In every possible way the Court ruled so as to confine the jury to narrowest possible limits in awarding damages, whereas its rulings should have been the reverse, so as to give the jury sufficient latitude to allow liberal damages, where the evidence warranted it.

22d ASSIGNMENT OF ERROR.

This assignment is at (page 33) of the Record.

The Court refused to give plaintiff's requested instruction that it was not the duty of the stockholders in the plaintiff company after the attachments, to put fresh capital into the business in order to continue in business, and thereby diminish the damages caused by the writs. (Rec., p. 129.)

We submit such refusal was error and prejudicial.

The testimony tended to establish that Charles L. Bucki and his mother, who owned four-fifths of the stock of plaintiff company, owned considerable property. (Rec., p. 90.)

The jury on such testimony would naturally think that they ought to have come to the rescue and furnished means to buy logs with, and continue business. It may be that perhaps if *plaintiff* had other property (which was not proven or attempted to be proved), it would have been its duty to have used it to continue in business, providing that the attachment left it free as a matter of right to use its mill properties, which is doubtful. Certainly the stockholders were not obliged to do so. They owed no such duty to this defendant. The giving of the instruction would have been beneficial to plaintiff and prevented

the jury from taking an erroneous view of the evidence showing the ability of some of the stockholders to put in fresh capital.

It was error to refuse to give the instruction that the stockholders in plaintiff's company were not bound to put new capital in its business to enable them to do business and avoid the consequences of the attachment.

In *Illinois Central Railroad Company vs. Cobb*, 64 Ill., 128-142, the Court said: "It would be very unreasonable to require one who has bought and paid for an article to have the money in his pocket with which to buy a second article in case of the non-delivery of the first."

Also, *Middlekauff vs. Smith*, 1 Md., 329.

"A loss through deprivation of means for protection is proximate and is a question of fact."

Derry vs. Flitner, 118 Mass., 131.

16th ASSIGNMENT OF ERROR.

This assignment raises an important question on the subject of mitigating damages. (Rec., p.41.)
(Exception, p. 127.)

On October 9th, a Saturday, plaintiff gave a forthcoming bond and regained possession of 1,250,000 feet, on which the attachment for $9,980.80 was levied. (Rec., p. 72.)

The bond was dated on the 9th, but was not taken and approved by the sheriff until the 11th of October. (Rec., p. 73.)

On November 4th, 1897, another forthcoming bond was given in the penal sum of $100,000, and plaintiff re-

gained possession of the remainder of the 5,200,000 feet of manufactured timber levied on, and the logs in the boom not then sawed up. (Rec., pp. 70, 71.)

Our contention was, and it was sustained by the Court below, that the forthcoming bonds did not release the lien of the attachments; that plaintiff held the property attached as a bailee of the sheriff to be delivered back into the sheriff's hands when demanded to satisfy any judgment that might be recovered in the action at any time before the attachment liens ceased to be operative, which was not till June, 1899, twenty months after the levy of the attachments. Writs of error were prosecuted and supersedeas bonds given, (Rec., pp. 68, 69) and when mandates of the Court of Appeals reached the Court below, application was made to the Supreme Court for writ of certiorari. (Rec., p. 70.)

The forthcoming bonds were conditioned as required by the Statute, which is as follows:

"The property so attached may at any time be restored to the said defendant or some other person for him, upon the defendant or such other person giving bond to the officer levying such attachment, payable to the plaintiff, with two good and sufficient sureties, to be approved by such officer, in double the value of the property levied on; such value to be fixed by the officer, conditioned for the forthcoming of the property restored and to abide the final order of the Court." (Rev. Stat.,Sec. 1652.)

That plaintiff held the property as bailee, subject to the lien of the attachments, we cite:

1 Shinn on Attachment, Sec. 288.
Collins vs. Mitchell, 3 Fla., 4-11.
110 U. S., 279, 280 and p. 542.

Such is the effect of the statute.

When the property is in the hands of defendant in attachment, it is as free from the reach of other process as if it had remained in the hands of the sheriff.

Shinn on Attachment, Sec. 288.
Cordoman vs. Malone, 63 Ala., 556.
14 S. W. Rep., 958.
71 Ill., 446.
Burch vs. Watts, 37 Texas, 135.
83 Iowa, 579.
33 Pac. Rep., 563.

Under a forthcoming bond conditioned as required by the Florida Statutes, the lien of the attachments continues until dissolved on motion.

1 Shinn, Sec. 288, and cases cited.

There was no contest on this latter point in the Court below. In some states the statute is different.

Plaintiff's contention was that in contemplation of law the personal property levied on was in the hands of the sheriff in *custodia legis* up to the time the lien of the attachment ceased to be operative, whether or not the plaintiff sold it.

If plaintiff sold it, it was still liable under the forthcoming bonds and under the indemnity bond; and its liability was the same and its credit was affected to the same degree and for the same length of time, as if no bonds had ever been given. The cloud and encumbrance upon plaintiff's assets was the same as if plaintiff had given no bonds.

If no bonds had been given, the inevitable result would have been that all such timber and lumber and logs attached must have been sold as perishable or subject to deterioration, and the proceeds placed in the registry of the Court, and there held until June, 1899.

Rev. Stat. of Fla., Sec. 1655, requiring such sale.

If such sale had occurred as it inevitably must have occurred if such bonds had not been given, the property would have been sold at a sacrifice, and in that case the defendant would have been subjected to the rule of damages, to wit: The difference between the market price of such lumber sold in the usual course of business and the price it actually sold at under such circumstances, and the legal interest upon the money tied up in the registry of the Court until the litigation was ended.

The Court was therefore requested to instruct the jury to allow as damages, in the absence of other evidence, the legal interest on the market price of the personal property attached from the date of the attachment until the litigation to sustain the attachment ceased, without any mitigation of damages because of any benefit plaintiff may have derived by holding or selling said property under such bonds.

The Court refused to so instruct the jury. For this refusal error is assigned. (Rec., p. 127.)

POINT OF LAW.

It is a general rule that legal interest on the value of property detained or while the owner lost the use of it, is a proper measure of damages in the absence of other evidence.

130 U. S., 611.

It is also an established rule that a trespasser or tortfeasor cannot apportion his wrong, the plaintiff being innocent, and cannot have the damages caused by his acts mitigated or reduced because of any benefit the injured party may derive *from collateral contracts or transactions between him and third parties to which the trespasser is a stranger.*

1 Sutherland on Damages, Sec. 158, and cases cited.

Familiar instances of this are where one's property being insured is destroyed by fire from the negligence of another, and the latter is sued for damages, he cannot reduce the damages from the fact that the owner had collected its full value from the insurer.

So if one sues for personal injuries, the wrongdoer cannot mitigate the damages by reason of the fact that the injured party has collected of an accident policy for more than his whole damages sustained by the injury.

94 Fed. Rep., 746-749.
17 How., 152.
103 Mass., 224-227.

So an attaching creditor, after it is decided the attachment was wrongfully sued out, cannot mitigate the damages by proving the property attached was used to pay other creditors of the defendant in the attachment.

Hundley vs. Chadwick, 109 Ala., 575.
19 Sou. Rep., 845 (Ala.)
1 Sutherland on Damages, p. 307, bottom of page

The plaintiff in attachment when the attachment is dissolved is liable for all acts done under color of the writ treated as a trespasser exactly as if the writ had never issued.

Hundley vs. Chadwick, 109 Ala., 575.
19 Sou. Rep., 845.
1 Sedgwick on Damages, Sec. 59.
27 Mich., 234.

Therefore he cannot claim any mitigation as such trespasser because of a benefit the defendant in attachment has derived by such collateral agreements, or charitable benefits bestowed by third parties. *Even if the en-*

tire damage had been paid by third parties, defendant can have no benefit from it.

Muller vs. Eno, 14 N. Y., 605.
Clow vs. Borst, 6 Johns., 37.
Blakeley vs. White, 4 Paige, 654.

The test is: is it not the duty of the injured party to do that or those things from which he has derived a benefit or has suffered less damages than he would have sustained if he had not checked the flow of the necessary or inevitable consequences of the trespasser's injurious acts.

Defendant in attachment is under no obligation to give a forthcoming bond. He may or may not do it, at his option. He owes no such duty to the attaching creditor.

Rev. Stat. of Fla., Sec. 1652.
1 Drake on Attachment (7th Ed.), Sec. 313.
Watson vs. Kennedy, 8 La. Ann., 280.
King vs. Childs, 30 Minn., 366.

It would be incongruous and illogical for a judicial tribunal to spend its time to find out how much benefit the injured party has derived from such collateral transaction, and then bestow it as a charity upon the trespasser. Courts are not organized for such purpose.

If third parties had paid the plaintiff the entire amount of damages sustained by the attachments, the defendant could not take a penny's benefit from it.

14 N. Y., 605.
See also 53 N. Y., 152.
18 Kan., 353.

Besides there was no evidence upon which the jury could say that the plaintiff derived any pecuniary benefit from having possession of the property as bailee of the sheriff.

17th ASSIGNMENT OF ERROR.

This assignment has been covered by the discussion of the 16th Assignment. (Rec., pp. 41, 42.)

On the same principle as that discussed under the 16th Assignment, the Court was requested to instruct the jury that plaintiff was entitled to damages for loss of the use of his saw-mill properties during the time from October 11th to November 16th, when under permission of the sheriff plaintiff sawed up all the logs in the boom which had been attached, precisely the same as if the mills had not been run at all and the logs had remained in the actual custody of the sheriff during that time plaintiff held them as bailee of the sheriff.

Such request was refused.

This was error for reasons and on the authorities cited, supra.

In contemplation of law, these 3,000,000 feet of logs remained in the custody of the sheriff all that time.

If plaintiff delivered to purchasers lumber ordered before the attachments were levied, the defendant has derived the benefit of being relieved, perhaps, of damages it would have sustained by loss of profits or back charges by sub-vendees, if the lumber had remained in the actual possession of the sheriff. This was benefit enough to defendant.

AVOIDABLE CONSEQUENCES.

The doctrine of avoidable consequencess does not apply to such a case.

It does not apply in any case where the act of commission of the wrongdoer or trespasser is voluntary and deliberate, or where the act of omission is voluntary and deliberate, and is not inevitable.

In such cases the injured party may fold his hands and let the consequences of the committed or omitted deliberate act flow on until it has spent its force. There is no duty to erect a dam in such a case.

If your neighbor's cattle break out of his enclosure and get into your corn, or by his unintentional negligence your property is set on fire, or he involuntarily breaks his contract, it is your duty to take positive and affirmative action to reduce the damages. This is under the doctrine of avoidable consequence.

We repeat it does apply to the case in hand. The defendant was not entitled to any such judicial charity.

Besides, there was no evidence by which such collateral benefit could be measured. It could only be guessed at, and the issue should not have been complicated or confused or obscured by the instruction given.

In such a case if no bond is given, and the property is not subject to deterioration, it would be held until the lien of the attachment ceased.

If not, it would be sold and the proceeds remain in the registry of the Court.

If sold by the plaintiff after received under such bond, its proceeds must be held till attachment ceases.

In either event, plaintiff has derived no benefit from it, and defendant would be liable for the detention of the property.

Plaintiff under contract with the sheriff and forthcoming and indemnity bonds, ran its mill from about October 11th to November 16th, but it had to hold the product cut during that time, or its proceeds if sold, and there is no benefit received by plaintiff measurable in money which can reduce its damages for that period of time.

The doctrine of avoidable consequences does not apply to such a case.

1 Sedgwick on Damages, Sec. 204, 205.

Property, the possession of which is held by virtue of a bond given in the course of a judicial proceeding, and process issued thereon, is "held upon process of the law;" no change in title is effected.

Miller vs. White, 14 Fla., 435.

If the person so holding parts with possession, he does it at his peril.

The rule is uniformly applied to bonds given for the forthcoming of attached property.

And so, where property is released to a third person, who executes a bond under a statute which provides that the sheriff may release attached property if defendant causes to be executed a bond to the effect that he will perform the judgment, such property is held to be constructively in the sheriff's custody; and where the attachment is wrongful, defendant's damage is to be measured *by the length of time it was in such custody.*

Seiz vs. Belden, 48 Iowa, 4451.

And in debt on a bond conditioned to indemnify the obligee for all costs and damages he might sustain by the wrongful suing out of a writ of seizure from the chancery court in a suit which was dismissed for want or prosecution, plaintiff may recover, if possession of the slaves seized under the writ is not restored to him, the hire of the slaves down to the time of trial, though after the dismissal of the bill a second bill was filed for the same purpose, and a new bond given conditioned for the forthcoming of the slaves to abide the final decree.

Zeigler vs. Davis, 23 Ala., 127.

The damages recoverable for wrongfully suing out an attachment extend to the value of the uses of the property while it was withheld from defendant, and this is so notwithstanding it was replevied by a co-defendant.

Munnerlyn vs. Alexander, 38 Texas, 125.

In the light of these authorities the refusals to instruct were errors. Considering the action of the Court at the trial in its entirety, there was slight grounds left upon which the jury could award damages.

In an action on an attachment bond, where the property has been released on defendant's bond given during the pendency of the action, damages may be recovered for losses and expenses incurred in defeating the attachment, as well before as after the attachment.

State vs. O'Neill, 4 Mo. App., 221.

19th ASSIGNMENT OF ERROR.

This Assignment is in the Record at (page 42).

It is for giving an instruction containing the converse of the proposition stated in the 18th Assignment. (Rec., p. 42. Exception, p. 128.)

20th ASSIGNMENT OR ERROR.

This was for refusing an instruction stating the same principle involved in the 16th Assignment. (Rec., p. 443.)

We insist that by selling the property and holding the proceeds for the sheriff, plaintiff derived no benefit and certainly none to which defendant was entitled.

31st ASSIGNMENT OF ERROR.

PLAINTIFF TAKEN BY SURPRISE.

This Assignment is at (page 50; Exception, 114-116).

Several days were spent proving the cost, value and good condition of the plaintiff's mill plant; that the plain-

tiff company was a going and flourishing concern on October 1st, 1897; that it was in a perfectly solvent and good financial condition to continue in a profitable business; that the output of the plant had been, on an average, for four years and a half, 2,500,000 feet per month; that it had abundant orders for lumber on hand; that the net profits of the plant for several months prior to the attachment had been per month large and substantial. (Rec., p. 68.)

All this testimony was adduced to lay a foundation for damages for the time plaintiff lost the use of its mill by and in consequence of the attachments and against repeated objections by defendant, which the Court overruled.

The declaration as to damages was framed and the plaintiff tried its case on the distinct theory and belief and was encouraged in it by such rulings of the Court that the loss of the use of its mill plant would be measured by the profits made prior to the attachments, at least that the latter would furnish a guide for the determination of such losses.

After the testimony closed, the Court, on motion of the defendant, ruled that such a measure of damages would not be submitted to the jury, because the Court would not submit to the jury the question of amount of damages caused by the writs because such damages could not be separated from those caused by the other alleged contributory causes.

See motion and ruling (Rec., pp. 114-116).

This took the plaintiff by surprise, and naturally so, for reasons stated in its motion to discharge the jury and postpone the trial. (Rec., p. 117.)

The denial of this motion is assigned as error. (Rec., p. 50.)

If this judgment is not reversed on other grounds, we submit it ought to be on this ground.

It is a settled rule that after the testimony is closed in the trial of a case on a definite theory, a party cannot change his ground and claim relief on a different theory, to the prejudice of his adversary.

It would take him by surprise. *What a party cannot do, certainly a Court cannot do.*

If the evidence as to past profits and output of the mill, etc., had been excluded when offered, the plaintiff could have asked and obtained leave to amend its declaration, and claimed as damages the rental value of the mill, or interest on the money invested, or deterioration of the property, costs of repairs and of watchmen when not in use; taxes, insurance, as well as losses on lumber, the delivery of which was delayed or prevented by the attachment. The action of the Court obviously took the plaintiff by surprise and bottled it up.

The theory on which the case was tried was that plaintiff was entitled to damages for loss of the use of its mills and business while the attachments were operative, to be measured, to some extent, by past profits.

We submit, the plaintiff's motion should have been granted, both because the action of the Court was erroneous, which made such a motion necessary, and because it operated to prevent proof of such other damages; and to come prepared to prove other damages.

4th ASSIGNMENT OF ERROR.

This Assignment is in the Record (at page 34), and is for refusal to give an instruction stated in this Assignment. (See Exception, Rec., pp. 120, 121.)

We do not know whether this request was refused because the Court withdrew from the jury the question

discussed under Assignment 24, and it is therefore insisted on as a distinct proposition.

It raises the question as to the proper way of proving the financial condition of the plaintiff on October 1st, and we submit the material question was: *What was the general financial condition of plaintiff on October 1st?* to be decided upon a consideration of its assets and liabilities, and not on the opinion of an officer of its enemy, The Atlantic Lumber Company, nor of any particular bank, or its officer, hostile to plaintiff.

The proper way to prove the financial condition is pointed out in the following cases:

Trammell vs. Ramage, 97 Ala., 666.
11 Sou. Rep., 916.
Pollock vs. Ganntt, 69 Ala., 373.
S. C., 44 Am. Rep., 519, 511.

It was a question of its general credit, not of the opinion of particular individuals. The real question was whether plaintiff's condition was such that it could have continued in business if the attachment had not issued. This was dependent upon the value of its assets and general credit. It was peculiarly a question for the jury.

Grimes vs. Bowerman, 92 Mich., 258.
S. C., 53 N. W. Rep., 751.

In that case, the Court said: "It is competent to show the condition of the firm business and the assets and credits of *the firm at the time the affidavit was made*, for the purpose of showing the want of probable cause for taking out the writ, and the availability of the business for the purpose of carrying on and eventually paying the firm debts."

Where reputation or character is involved, inquiry into particular instances of bad conduct is not admissible. The law recognizes human infirmities. So business men

recognize and the law too, that the strongest business houses may be for one cause or another temporarily embarrassed and still entitled to confidence and credit soon afterward.

When the evidence showed that plaintiff had unencumbered assets to the amount of over $200,000 and but one piece of its matured paper, for about $5,300,was due, and a set-off to the greater part of that, we submit it was erroneous to allow a witness to express his individual opinion as to its financial condition, and the instruction requested should have been given.

5th ASSIGNMENT OF ERROR.

This Assignment of Error is (on page 36) of the Record.

It is for the refusal of the Court to instruct the jury that the Atlantic Lumber Company could not on October 1st bring a suit for an installment of logs that became due that day. There is no division of days—plaintiff had all that day to pay in, and was not liable to suit until the next day. Such claim was not a liability on October 1st.

Such is the rule without exception upon all contracts to pay money, save a certain class of commercial paper.

Bishop on Contracts, Sec. 1439.
18 Cal., 378.
6 Watts, etc., 179.
102 Mass., 65.
3 M. & W., 473.
89 Fed. Rep., 482.

As the defendant was attempting to attack the credit of plaintiff on October 1st, it was material for the jury to know that plaintiff was not in default to The Atlantic

Lumber Company on the day it sued out these writs, even though it had no set-off to its demands, as shown by the bill of exceptions.

No other creditor had any claim due October 1st except the National Bank of Jacksonville, the holder of the draft for $5,340.75 against which plaintiff asserted a set-off to the amount of $4,000.

And we submit this request was a reasonable one to explain to the jury that The Atlantic Lumber Company had no right to question plaintiff's credit on the day it brought suit, and would have had a favorable effect upon the minds of the jury, consequently its refusal was prejudicial.

6th ASSIGNMENT OF ERROR.

This Assignment is at (page 35) of the Record; Exception, (page 122).

It was for refusing to give an instruction to the jury on the subject of the plaintiff's financial condition. The effect of the refusal to give the instruction was prejudicial to the plaintiff. It would have shown to the jury that The Atlantic Lumber Company had no right to demand payment of the draft for $5,340.75, the only piece of matured paper of the plaintiff's outstanding which *that company did not hold.* It required the jury to consider a set-off of $4,000 to that draft in the hands of the bank. It also explained to the jury that the indebtedness of The Atlantic Lumber Company to the bank *should not be confounded with plaintiff's indebtedness.*

It is submitted that instruction was proper and should have been given.

Where a large amount of testimony is turned in upon the jury like crude stuff into a hopper, we think it essential to a fair and just and impartial trial that the Court

should explain to the jury the bearing and applicability of the evidence to material issues.

Certain it is that the jury should have clearly understood that the debts of The Atlantic Lumber Company to the bank could not be applied to affect the credit of the plaintiff, for there was no pretense that plaintiff was in any way liable for such debts.

Taking the draft for $5,340.75 for balance due for logs August 15th, including an advance of $2,000, and negotiating it, precluded The Atlantic Lumber Company or defendant from claiming that plaintiff was in default for any payment for logs due on the date of such draft.

64 Fed. Rep., 569-574.

25th ASSIGNMENT OF ERROR.

This was for the refusal of the Court to give to the jury an instruction stated in that Assignment. (Rec. p. 47. Exception, 131..)

The bill of exceptions shows that owing to the enormous accumulation of lumber on plaintiff's wharves in the summer of 1897, because the purchaser could not or did not obtain vessels to take it away and pay for it, a few of plaintiff's drafts went to protest; but were paid a few days after protest. This occurred prior to August 15th, 1897. The Court was asked to instruct the jury that the fact of such protest and payment at that time was immaterial on the subject of the financial condition of plaintiff on October 1st, provided the jury found plaintiff had the means of continuing in business on October 1st, if the attachments had not been levied.

We think it was a proper charge.

The request was in effect to exclude the testimony as to protest of such drafts as too insignificant and remote

to affect plaintiff's condition on October 1st, when vessels commenced to arrive and proceeds of lumber commenced to be received.

See Testimony (Rec., pp. 100, 101).

The fact that the payment of such drafts was for a day or two delayed, all having been paid from six to ten weeks before October 1st, the day on which to apply the test of its financial condition, was too remote. Such evidence should have been wholly excluded. The least the Court could do was to instruct the jury that it was immaterial of the issue presented.

The point in issue was plaintiff's financial condition on October 1st. Withholding the requested instruction left the jury at liberty to consider that its financial condition in June and July was a material fact. As it was a conceded fact that all evidence of its impaired financial condition in June and July consisted of the non-payment of these drafts for a few days after maturity, and that they were all paid before August 15th; that the failure to pay them promptly was due to the fact that purchasers of lumber could not get ships to move the lumber, we submit such evidence was immaterial and irrelevant to prove the issue of its financial condition on October 1st.

The reason why such evidence is not proper is that it "tends to draw away the minds of the jurors from the point in issue and to excite prejudice and mislead them."

1 Greenleaf on Ev. Sec. 52.

There was no evidence tending to establish plaintiff's inability to meet its obligations, even temporarily, continued from June or July down to October 1st. The evidence sought to be declared immaterial to the point in issue was too remote, and of isolated and collateral facts.

There was no pretense that on October 1st there was more than the one piece of plaintiff's commercial paper outstanding. It certainly was able to pay that on October 1st. It had from sixty to eighty thousand dollars worth of lumber on its wharves and not a lien for a dollar on it. Plaintiff did not pay it because it asserted a set-off of $4,000 against it.

So plaintiff was able to pay the claim of the Atlantic Lumber Company for balance of logs delivered, but it asserted a set-off against such claim, and the above were the only claims shown to be due.

Ability to pay should not be confounded with a refusal to pay.

The evidence objected to had no logical tendency to prove plaintiff's financial condition on October 1st.

It tended to mislead and prejudice the jurors when plaintiff did not deserve to be prejudiced by such testimony.

The question only becomes of prime importance in case of another trial for the reason that the refusal to submit to the jury the main question stated in the 24th assignment eviscerated the plaintiff's case.

This was for refusing an instruction contained in the assignment, found at (page 47) of the Record; Exception (page 132).

The request was to submit to the jury whether the sale of plaintiff's mill properties in February, 1899, (while the lien of the attachment was still operative) upon an execution on a judgment obtained upon an *obligation incurred after the attachments were levied was caused by the attachments*. If it was, damages should not be reduced because of such sale.

(See testimony, Rec. p. 85-86.)

It may be that this was refused because of the action of Court complained of in the 24th assignment, by which the Court took the whole subject of damages after October 11th, 1897, from the jury so far as the loss of the use of its mills was the cause.

If plaintiff incurred the debt on which the judgment was had in a reasonable effort to *continue in business after the attachments, but was unable to do so,* owing to the lien of the attachments and the continuance thereof by writs of error, then the sale was caused by the attachments.

It was one of the consequences of the attachment, which defendant covenanted to pay. It certainly was a proper question for the jury.

In *Grimes vs. Bowerman*, 92 Mich., 258; s. c. 53 N. W.Rep. 751, the same question was presented. The Court said: *"It was competent for plaintiff to show the subsequent attachments and the foreclosure of the chattel mortgage, it being left for the jury to say whether such acts resulted from defendant's suing out his attachment."*

It is a question of cause and effect which is exclusively for the jury.

27th Fla. 116.

Had plaintiff made no effort to go on in its business. then it would have been urged in defense that it ought to have made an effort.

Having made the effort, and failed because of such attachment liens then plaintiff's damages caused thereby should not be reduced. (Rec. p. 82.)

For these reasons the assignment is insisted on.

The testimony established that a prosperous business of considerable magnitude was entirely destroyed by these

attachments and by the persistent efforts to continue them upon plaintiff's property until it was ruined.

Defendant's covenant is to pay "all damages in consequence of said attachments." Up to date it has not done so, and there has been a miscarriage of justice by taking questions of material facts from the jury upon which there was ample evidence.

34th ASSIGNMENT OF ERROR.

This Assignment is at page (51 of the Record).

It is for refusing to exclude the testimony of Bion Barnett, Cashier of a Bank. Upon an assumed statement of the amount of assets and liabilities of plaintiff he was allowed to give his opinion as an expert as to plaintiff's financial standing on October 1st, 1897. (Rec. p. 104.)

This was not a subject of expert testimony. The jury were as competent to judge of that as he was. It was not a question of "science, art, skill or trade." It was a matter of common knowledge.

1 Greenleaf on Ev. Sec. 440.
Ferguson vs. Hubbell, 97 N. Y. 511;
Wyckles vs. Brooklen, 118 N. Y. 429;
94 U. S. 469;
113 U. S. 645;

The testimony of this witness was obnoxious because his bank had a controversy with plaintiff as to its liability for the full amount of the draft for $5,340.75, and because this Bank was a large creditor of the Atlantic Lumber Company and as the latter Company was liable for judgment against the defendant, its surety, such judgment would diminish its means of paying the Bank.

(See record p. 85, last part.)

The Atlantic Lumber Company had no credit with any other Bank. Letter of Meigs, (Rec. p. 98.) The great anxiety of The Atlantic Lumber Company was not in respect to the credit of the plaintiff but in regard to its own credit.

We submit that the serveral errors assigned, were prejudicial to plaintiff, and that it has not had a fair trial of its case upon the evidence and law applicable thereto.

COUNSEL FEES INCURRED FOR SERVICES RENDERED IN OBTAINING A DISSOLUTION OF THE ATTACHMENTS ON MOTIONS MADE AND DECIDED BEFORE TRIAL OF THE ACTIONS ON THE MERITS.

It appears in the Record that in a special verdict the jury found the amount of such fees to be $7,500, and the Circuit Court refused to include that sum in its judgment. To such refusal plaintiff excepted and assigned error No. 35. (Rec., p. 52.)

The Appellate Court sustained this Assignment and ordered the judgment to be amended so as to include the said sum of $7,500. (Rec., p. 119.)

The basis of the defendant company's petition for the writ of certiorari, is that the Court of Appeals erred in thus allowing such counsel fees; and said petitioner assigns this as error in this Court.

The plaintiff, to support its contention that such counsel fees are under the laws of Florida proper elements of damages, within the condition of the bonds, submits the following authorities and argument:

The opinion of the Court of Appeals in the case:

48 C. C. A., 436.

S. C., 109 Fed. Rep., 393.

This Court, at its last term, held that a suit on an injunction bond given in an equity suit in the Federal Court, contained a Federal element, and that as to attorney's fees as damages on dissolution, the prior decision of this Court must control.

Tulluck vs. Mulvane, 184 U. S., 497.

But in that case the *converse of the proposition thus declared was also maintained*, to wit: that when the bond was given under the laws of the state, *the local law controlled*. The proposition being true, the converse is true.

There is a local law that governs this case, and it was so held by the Court of Appeals.

48 C. C. A., 436, 445.

In *Wittich vs. O'Neil*, 22 Fla., 592, *decided in* 1886, *the local law was declared.*

Therefore, *eleven years* before these attachment bonds were executed, counsel fees for obtaining a dissolution of an injunction were ruled to be a proper element of damages in a suit on the bond. The condition of the injunction bond in that case was: "Shall pay to the said W. L. Wittich all damages he *may sustain* by the issuing of said injunction in case the injunction be hereafter dissolved."

Id., p. 595, at bottom of page.

The substance of the condition of said injunction bond and of these attachment bonds are in legal effect substantially identical, except that the attachment bonds contain a liability for "all costs" which the injunction bond did not.

And the Supreme Court of Florida, in 1855, held that the word "costs" *included attorney's fees as between client and attorney*, and employed the words "fees" or "costs"

Carter vs. Bennett, 6 Fla., 258, 259, 260.

In *Gonzales vs. DeFuniak Tobacco Co.*, 41 Fla., 471, 477, *which was a suit upon an attachment bond* the Florida Court again ruled that attorney's fees were a proper element of damages under the condition of the bond, without specifically stating whether or not they were included in the words "all costs" "or damages."

And there is a stronger reason for allowing such fees on an attachment than on an injunction bond. This is pointed out in *Territory ex rel. Lyser vs. Rindscoff*, 4 N. M., 363, 20th Pac., 180, by the Supreme Court of New Mexico, which held that the case of *Oelrichs vs. Spain*, 15 Wall., 211, *had no application to a suit on an attachment* bond, in a well considered opinion.

MERITS AND SERVICES ON INTERLOCUTORY MOTIONS DISTINGUISHED.

The distinction between services *in defense of the suit* on the merits and on such motions is obvious.

Any party has a right in good faith to sue at law or equity, without incurring any liability, except ordinary costs; but injunctions or attachments are only obtainable *on certain conditions imposed by local law.*

Judge Shelby, in his dissenting opinion, fails to observe such distinction in his citations of authorities

48 C. C. A., 449.

He cites:

Ascambel vs. Wiseman, 3 Dall.306.
Day vs. Woodworth 13 How., 363.
Ins. Co. vs. Conard, Bald., 138.
S. C., Fed. cases No. 10,647.
The Nuestra Lenora de Regla, 17 Wall., 29.

In neither of those cases was there any suit on an *injunction or attachment bond. The question arose in*

the suit on trial, and by the law of the land, *everywhere*, where the common law prevails, attorney's fees are not allowed for services of attorney in the suit on trial. It must be for some *prior litigation.*

He cites *Bing Gee vs. Ah Jim*, 7 Fed., 811, a suit on an attachment bond where claim for attorney's fees was striken out of the declaration as immaterial. *Why?* Because later on in the opinion of the Court it will be found that such fees were regulated by statute. It was a case of *first impression under local statutes*, and the question had not been decided by the state Court.

35 Fed., 395, was cited by the learned judge. That case arose on a *garnishment proceeding and the local law on the subject, as* declared by the state Court, was followed.

The case of *Sonneborn vs. Stewart*, 2 Woods, 599, is cited, where Justice Bradley ruled that counsel fees for obtaining a *vacation of an adjudication of bankruptcy* were allowable as damages in a suit for malicious suing out bankrupt proceedings. Judge Shelby seems to be of the opinion that the Supreme Court reversed that ruling on a writ of error in *Stewart vs. Sonneborn*, 98 U. S., 197. We do not so understand the decision in the latter case. On the contrary, we think *it is clear that no error was assigned on the ruling of the Court below on the charge of the Court to the jury that attorney's fees were allowable for obtaining a vacation of bankrupt proceedings.*

In the Court below, in that case, *the defendant requested the Court to instruct the jury that they could not allow counsel fees for prosecuting "this suit"*—that is the malicious attachment suit. Error was assigned for refusing to give that instruction. This is established as follows:

Near the close of Mr. Phillips' brief for the defendant in error, he said: "The Court, having limited counsel fees to those incurred *in resisting the proceedings in bankruptcy*, was not required to instruct that they should *not be allowed in another and different proceeding.*"

Id., p. 191.

On page 197 (98 U.S.) this Court said: "The Court was *asked to charge* that the jury, if they found for the plaintiff *could not, in estimating the damages, consider* the *fees of counsel in prosecuting the case.*"

Again, on same page, this Court said: "The fees of counsel *in prosecuting this case were no part of the consequences* naturally resulting from the action of defendants in suing out the decree and warrant *of bankruptcy.* * * * That such fees are not recoverable and why they are not was clearly shown in *Good vs. Maylin*, 8 Pa. St. 51; *Alexander vs. Herr*, 11 Id., 537; *Stopp vs. Smith*, 71 Id., 285; *Hicks vs. Foster*, 13 Barb. (N. Y.), 424. The rule asserted in those cases (local law) we think, is correct, and should *have been given to the jury in the present case.* The defendants were the more injured by the *refusal to give it*, because evidence was given of the *cost of prosecuting the suit*, calculated immensely to influence the damages—evidence which should not have been offered or received."

Id., 197.

See also close of Justice Bradley's opinion, p. 202.

It is thus clearly established that the Supreme Court said it was error *to refuse to give an instruction requested by defendant* that attorney's fees were not allowable for *services in the case then before the Court* for malicious prosecution, begun in the Circuit Court for the Middle District of Alabama. It is plain that no error was as-

signed on the charge of the Circuit Court allowing counsel fees for services in the District Court in *obtaining the setting aside* of the adjudication in bankruptcy.

Judge Shelby failed to observe the distinction above pointed out, and failed to see that the case was reversed on the *sole grounds* of taking from the jury the question of probable cause, and the malice; and for refusing *to give an instruction that counsel fees were not allowable for* services of plaintiff's attorneys *in prosecuting the action for malicious prosecution.*

The distinction is a broad one between counsel fees for resisting bankrupt proceedings in the *District Court*, and those for prosecuting an action *in the Circuit Court*, for malicious prosecution of such bankrupt proceedings *in the District Court.*

The case of *Oelrichs vs. Spain*, 15 Wall., 211, was cited. That was an equity case that *arose* in the District of Columbia; there never was any motion made to dissolve the injunction in that case, and, as held by the Federal Supreme Court of New Mexico, has no application to the case at bar. It did not arise under any local law.

Territory ex rel. Lyser vs. Rindscoff, supra.

THE DECISION OF GONZALES VS. TOBACCO CO., 41 FLA., 471, A DICTUM.

This was decreed by Judge Shelby. The Court of Appeals held otherwise.

Judge Shelby also held that if not a dictum, the case was *decided after the attachment bonds were given*, and for that reason not binding on the Federal Court. The Court held it was bound, or, at least would follow, the decision of the local Court on a question of damages on a contract under a state statute.

RIGHT ACCRUED BEFORE ANY STATE DECISION.

Judge Shelby held that the defendant surety company *had acquired the right to the independent judgment of the Federal Court,* as to the measure of *its* liability under the condition of its statutory bonds, because such bonds were executed before there had been any state decision on the subject, and cites 107 U. S., p. 20.

The learned judge seemed to regard the case of *Wittich vs. O'Neil,* 22 Fla., supra, and *Bennett vs. Carter,* 6th Fla., though decided many years before October 1st, 1897, *the date of the attachment bonds,* as of no importance. Whereas the case of *Wittich vs. O'Neil,* though on an injunction bond, *is as controlling as if it had been on an attachment bond;* and the Florida Court cites that case as authority to control itself in the case on an attachment bond of *Gonzales vs. Tobacco Co.,* 41 Fla., 477.

Besides, in *Burgess vs. Seligman,* 107 U. S., 20, the Supreme Court of the state *made subsequently a contrary recision.* And this Court said: "But even in such cases for the sake of harmony and to avoid confusion, the Courts of the United States *will lean towards an agreement of views with the State Courts,* if the case seems to them balanced with doubts."

Id., 21.

For much greater reason will the Federal Courts *lean to the views* of the State Courts, when the latter have decided the question *before* the Federal Courts have, even though under circumstances when the state decision is not absolutely obligatory on the Federal Courts.

In *Bartholomew vs. City of Austin,* 29 C. C. A., 568, the Federal Court had decided the question *before* any decision of the state Court.

Therefore, neither that case nor *Burgess vs. Seligman* 107 U. S., has any special application to the point in hand.

POINT OF LAW.

These bonds were executed on the 1st day of October, 1897.

Now, *what rights* did the obligor acquire when it executed these?

(a) Certainly not the right to a decision of a Federal Court that it was *not liable* to the counsel fees in question; for the Supreme Court of the United States *had never decided* that a surety on an attachment bond was not liable.

(b) When the bond was executed, did the obligor then *acquire a right to have a Federal Court determine* the measure of its liability? If so, how?

The bond was given in conformity to a local statute. It was given in an action *in the State Court* (Removed to the Federal.)

Plainly there was no right to assume the action would be removed to a Federal Court; but as it involved no Federal question, the obligor could not have contemplated that *it's obligation would ever be determined by a Federal Court.* It was beyond *its* power to secure a determination by a Federal Court. Therefore, it never could have contemplated that it would be exempt from paying such counsel fees under the rule in the Federal Court that on an *injunction bond given in a Federal Court* the surety was not liable to such damages.

This being undeniably so, it necessarily must have contemplated that the measure of its liability would be such as the State Court *had already, or might thereafter, determine.*

The State Court had then *already* determined that on an injunction bond, with a condition in legal effect not so broad as in these attachment bonds, it was liable to such damages; and, therefore, so far as the obligor *contemplated* its liability at all, it must have contemplated a liability *declared* by such prior decision in *Wittich vs. O'Neil*, 22 Fla., supra, made eleven years before. If it took the advice of counsel, it was unquestionably so advised, and therefore cannot complain. And undoubtedly it would have been advised that its liability in any event would be decided by the State Courts, as it has since been decided in an action on an attachment bond, with exactly the same condition. (41 Fla., 471.)

The fact of the mere incident that the suits were removed to the Federal Court cannot diminish the force of the above contentions, *so far as this surety ever contemplated* by what Court its liability would be determined.

(c) The result is, that the obligor, when the case was removed to the Federal Court, must then have *contemplated* that the Federal Court, *if not bound by a prior state decision*, would construe the bond and determine the liability in harmony with such prior decisions of the State Court. ....

Burgess vs. Seligman, 107 U. S., 21-34

Therefore, considered as an open question, the decision of a majority of the judges of the Court of Appeals was unquestionably sound.

Plaintiff, therefore, relies upon the case as decided by the Appellate Court, as conclusive. And we rely upon the *very general rule* prevailing in most of the states, that counsel fees are a proper element of damages.

The cases are cited in I Sedgwick on Damages, Section 237.

Counsel fees were held to be an element of damages in the following Federal cases:

Territory ex rel. Lyser vs. Rindscoff, 4 N. M., 363.
S. C. 20 Pac. Rep., 180.
34 Fed., 474-476.
38 Fed., 311-317, by Justice Brewer.
2 Woods, 603, by Justice Bradley.
12 Fed., 265, by Judge Pardee.
147 U.S., 103-111, where allowance of counsel fees in prior litigation was approved.
7 Biss., 99-101.

In 18 Fed., 312, and 35 Fed., 315, they were not allowed by the local state decisions.

In every case in a Federal Court where the question has arisen, the local law has been followed.

So far as any question of public policy is involved, each state declares its own upon all questions; and when declared, it is conclusive on the Federal Courts; especially so on a rule of damages arising out of contract.

Hartford Fire Insurance Co. vs. Chicago, etc.Co., 175 U. S., 91.

That case precludes futher argument.

Congress, by statute, lately declared that upon a bond in involuntary bankruptcy proceedings, the obligors *shall be liable for counsel fees for services in obtaining a vacation of an adjudication in bankruptcy.*

See Bankrupt Act, Sec. 3, Letter E.

Such provisions ought to settle the question as to Federal public policy on this subject of attorney's fees being a proper element of damages in such cases of improper seizure of property.

The Court in the case *In re Abraham*, 93 Fed. Rep., 768, held that a party who had obtained in a case of bank-

ruptcy *a judicial order*, under which the property of a citizen was seized, should on the vacation of such order, pay all damages, including counsel fees caused thereby. In that case *it was a judicial order, obtained after notice and a hearing.* In the case at bar, the writ of attachment is issued by a ministerial officer, the clerk of the Court acting *ex parte.*

21 Fla., 189.

In 120 U. S., 210, *et seq.*, the Supreme Court declared that in a suit on an injunction bond, in a State Court of law, given in a *Federal bankruptcy case, the measure and rule of damages was according to the laws of Louisiana.*

In 170 U. S., 472-473, the Supreme Court held that the measure of damages in an action of trover was controlled by the decisions of the State of South Carolina, and that Sections 621 and 914 of the Revised Statutes of the United States made such decisions obligatory on the Federal Courts.

The case at bar was commenced in the State Court. It would be an intolerable anomaly that one measure of damages should be applied in the State Court and another in a Federal Court in that state, in a suit upon a local statutory contract. Especially when dependent on the contingency of right of removal.

In *Burgess vs. Seligman*, 107 U. S., 33-34, the Supreme Court declared no such anomaly can exist, and that Section 621 of the Revised Statutes was passed to prevent it.

BENEFIT TO SURETY.

If the attachment is not dissolved and the property attached is perishable, or subject to deterioration, the state law requires it to be sold, and the proceeds paid into the registry of the Court to abide judgment on the merits. (Rev. Stat. of Fla., Sec. 1665.)

It would be a rare case where the property would not be sold at a sacrifice.

In this case at bar, in the suit in which the attachment for $75,000, which caused nearly all the damages, was issued, judgment on the merits was in favor of defendant in attachment.

If the attachment had not been dissolved, and property sold at a sacrifice (and so large an amount probably would have been), the damage thereby caused would, doubtless, have been greater than the amount allowed by the jury for counsel fees.

In this view of the case, which is a reasonable one, the damages would have been larger than the jury allowed for obtaining the dissolution of the attachment. Consequently defendant has been actually benefitted by the service of obtaining a dissolution of the attachment.

Our conclusions contended for on this branch of the case are:

1. That the question is one under local laws, and the Federal Courts are bound by the state decisions.

2. That it is a question of local law, and if the Federal Courts are not bound by state decisions, no Federal element is involved; and good reasons appear why the Federal Courts should decide in harmony with such state decisions.

3. That the question is conclusively settled by *Tulluck vs. Mulvane*, 184 U. S., supra, where *the converse of the proposition here involved was maintained.*

OTHER ASSIGNMENTS OF ERROR BY THE DEFENDANT SURETY COMPANY IN THE COURT OF APPEALS.

That part of the Record in this Court (pp.143-212) which embraces the Record in the Court of Appeals, removed there by the writ of error sued on by the Fidelity & Deposit Company, contains 39 assignments of error by the said company.

They were based on exceptions to rulings of the trial judge. (Nos. 1 to 36, inclusive.)

It will be observed that no one of such exceptions, save the 15th and 16th, *state any grounds of exception whatever to the rulings* of the trial judge, and under the rules of Court, the plaintiff in error in said writ was not entitled to have such assignments considered; and they were not considered.

Said assignment No. 15 was for refusing *to admit evidence* to show what use was made of the proceeds of the lumber sold after possession was acquired under forthcoming bonds. That did not concern the surety company. If such lumber was sold, it was at plaintiff's peril, for it was the bailee of the sheriff; and the surety company could derive no benefit from such sale, no matter what use was made of the proceeds.

See authorities cited on p..... of this brief.

Said assignment No. 16 was for refusing to exclude evidence that salaried employees were idle by reason of the attachments.

This has already been discussed.

There is no merit in any of the said 39 assignments, and the most of the questions raised thereon, even if so

made as entitles them to consideration, have been discussed in a previous part of this brief.

From reading said 39 assignments of error, it is apparent that the views of counsel for the surety company are, that the latter is liable to no damages whatever as a consequence of these writs, *except taxable costs caused by such writs.*

AMOUNT OF THE VERDICT AND JUDGMENT AS INCREASED BY THE APPELLATE COURT.

We contend there was no reversible error to the prejudice of the surety company.

1. Both reason and authority sustain the allowance of counsel fees.

2. That even though some of the errors by the surety company assigned on the rulings of the trial judge were sustained, they were too inappreciably injurious to justify a reversal.

The verdict for $10,800 could not reasonably be reduced at another trial. The legal interest at eight per cent., under the laws of Florida (Rev. Stat., Sec. 2320), on $80,000 worth of personal property for the twenty months it was detained, amounts,without rests, to nearly that sum, and making a rest at the end of the twenty months, say June 1st, 1899, to the date of the verdict, February 2d, 1900, it would amount to more than the verdict by several hundred dollars.

Substantial justice having been done, so far as the surety company is concerned, the judgment would not be reversed at its instance, when it is apparent it could not justly be less as a result of another trial.

Therefore, unless reversed at the instance of the plaintiff on its assignments, the judgment should be affirmed.

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IN THE

Supreme Court of the United States.

No. 220.

THE FIDELITY AND DEPOSIT COMPANY OF MARYLAND,

vs.

THE L. BUCKI & SON LUMBER COMPANY

BRIEF REPLYING TO AND POINTING OUT ERRORS OF FACT IN THE BRIEF OF PETITIONER.

In the Circuit Court The L. Bucki & Son Lumber Company was Plaintiff, and the Fidelity and Deposit Company was Defendant, and We Will So Designate Them.

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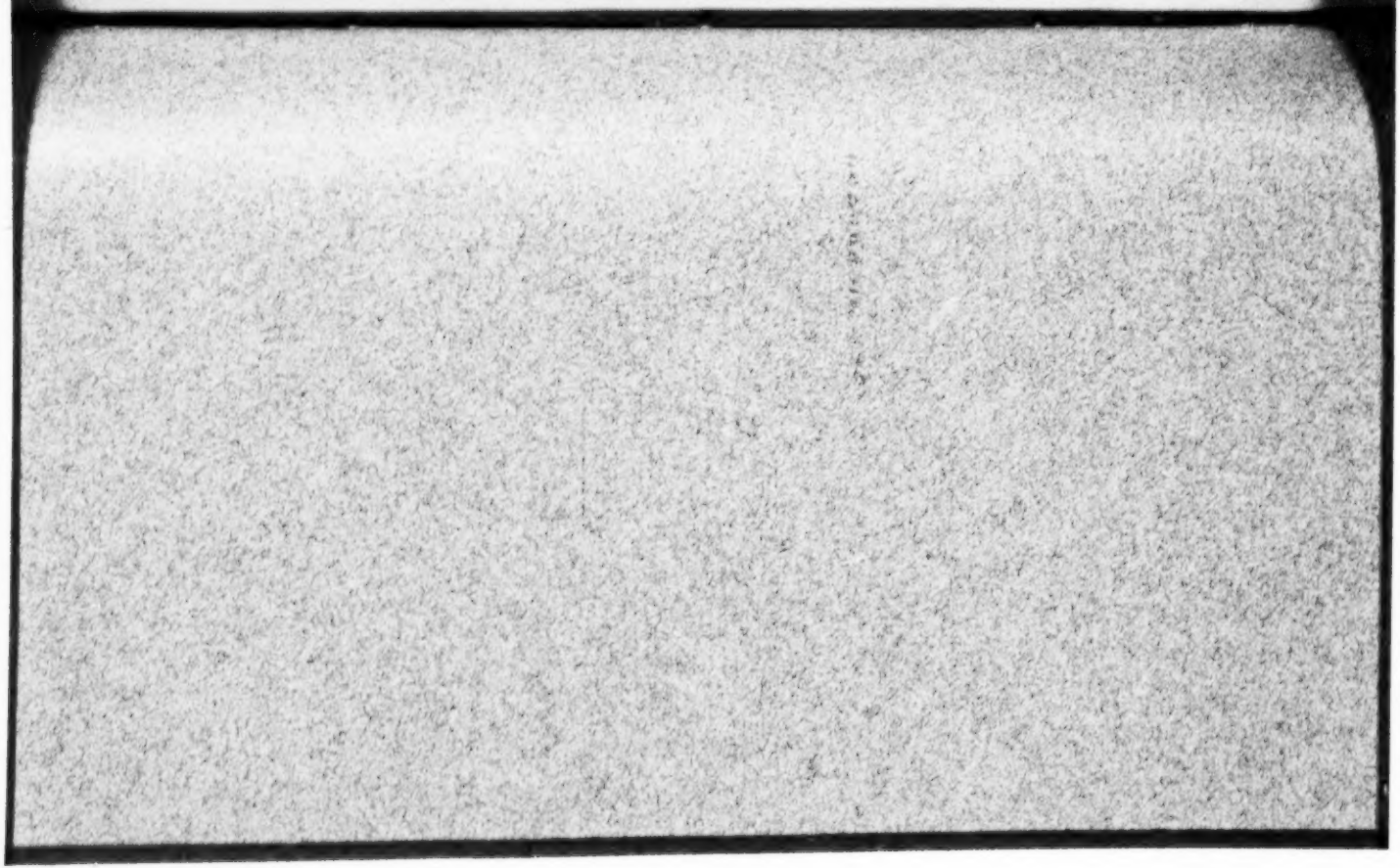

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I—ERROR OF DENENDANT.

Defendant in its brief assumes that the trial Judge, submitted to the Jury, the question of damages, to plaintiff's credit, caused by the attachments, as a separate and distinct element of damages. This is not true and plaintiff com-

plains because that question was not submitted to the jury. See Instruction on that subject requested and refused. Rec. p. 103.

II—ERRORS OF DEFENDANT.

Defendant in its brief assumes and argues that the trial Judge submitted to the jury the question of damages from the loss of the use of its mill plant for the entire period of 20 months the lien of the attachments rested on its properties.

This is not true, and plaintiff complains because the Court refused to submit that question to the jury. See instructions requested, and refused, Rec. p. 102-3-5-6-7, and 108.

Such an instruction if given as to loss of use of plaintiff's mill plant, would have been absolutely inconsistent, with the instructions given, to wit: A. With the instruction to allow plaintiff interest on the value of the lumber attached while the attachments rested on such lumber. See instruction given. Rec. 109.

B. Such an instruction to allow damages for loss of the use of the mill plant would have been irreconcilably inconsistent with the instructions given to allow as damages, wages paid idle employees, and watchmen during the time the mill plant could not be used, in consequence of the attachments.

See instructions given on those subjects, Rec. 175-176.

C. Such an instruction to allow damages for loss of use of mill plant would have been inconsistent with instructions given allowing as damages the difference between what purchasers had to pay for lumber they purchased in the market to make up deficiencies of lumber purchased from plaintiff and not delivered.

See instructions given on that subject, Rec. 179.

D. The trial Judge only submitted to the jury the question of damages for the loss of the use of plaintiff's plant for the period of time between Oct. 1 and Oct. 11, 1897, and the jury so understood it as, shown from their general verdict which was for only $10,880. Rec. 28, and Rec. 102 near the top.

III—ERRORS OF DEFENDANT'S BRIEF.

Said Brief states on p. 5, that it was admitted by Bucki Company, that after the Atlantic Lumber Co. refused on Oct. 1, 1897, to deliver any more logs. "It would have been necessary for it to have embarked in the logging business and it proved by one Murphesee that such an enterprise would have required an investment of from $150,000 to $250,000."

This is not true. There is no testimony in the Record that plaintiff would have had to engage in the logging business to supply its mill with logs after Oct. 1, '97. On the contrary, the evidence establishes, that plaintiff up to Oct. 1, had paid the Atlantic Lumber Co. seventy-five cents per thousand feet more than the market price of logs. That logs were supplied in the Jacksonville market by the St. Johns River and by railroad by loggers other than the Atlantic Lumber Co.

See testimony of Barker, Henry Clark and Cashhen, the latter two owners of saw mills in Jacksonville. Rec. pp. 80-81. Cashen testifies that his logs for the year 1898 cost him only $5.80. Rec. 81, near top. Whereas plaintiff had been paying under contract with the Atlantic Lumber Co. $7.25 per M. See paragraph 5 of contract. Rec. 91 near bottom.

Arthur Meigs, the General Manager of the Atlantic Lumber Co., testifies that after its refusal, on Oct. 1, to deliver any more logs to plaintiff, it still continued to get out and sell in Jacksonville, 2,000,000 feet per month. Rec. 81, near bottom.

The Atlantic Lumber Co. prior to Oct. 1 had sold and delivered all its logs to plaintiff, and as after that date it delivered all its logs, to other manufacturers and mill owners, necessarily, the plaintiff could have bought from the river loggers, and other loggers, their logs, which before then they sold to other mill men.

The statement in defendant's brief is not true for the further reason, that, there is always a supply for a demand for articles, easily obtainable, and, by this law of supply and demand the presumption is, that the plaintiff would

have obtained all the logs it needed to supply its mill, especially by offering for them $7.25, which it had been paying the Atlantic Lumber Co., or $.75 more per M. than the market price.

WHAT PLAINTIFF DID PROVE.

It proved that it could have supplied its mill with logs, had it been necessary within 60 days after Oct. 1 by engaging in logging itself.

Its own officers testified plaintiff could have done it within 60 days. Rec. p. 82, near top.

Daniel G. Ambler, the President of the Atlantic Lumber Co., testifies it could have been done in 60 days. Rec. p. 81.

And plaintiff proved that it had control of 33 miles of iron rails for spur tracks; 52 flat cars, or car trucks, and 3 locomotives, which with some repairs, were available for a logging plant. Rec. 69, middle of page.

All the capital plaintiff needed to engage in logging, would only have been sufficient to buy logging, carts, mules and harness.

Murphee's testimony as to the requisite logging plant would have cost, including iron rails, cars, and engines was entirely illegal. He was a mere salesman in New York City. He knew nothing about the costs of a logging equipment. It is not shown that he knew anything about the business. Rec. 87.

Such testimony, if not ruled out, is incompetent, would have had no weight with a jury, as against the testimony of Meigs, the General Manager, of the Atlantic Lumber Co., with large experience in the business. He testified that a complete logging plant, including rails, cars, and engines adequate to get out 2,000,000 feet per month, would cost from $50,000 to $75,000. Rec. 71, near bottom.

And Barber, testifies, that with using a tram road he with an expenditure of $6,500 got out 10,000 feet per day (250,000 per month). Both Meigs and Barber, as well as Murphee, were defendant's own witnesses.

So that there was ample testimony to justify a finding

by the jury that plaintiff by purchasing logs in the market, or logging itself, or both, it could have fully supplied its mill with logs, and that it had the means to do both.

And it being established that there was an abundant supply of logs, standing in the forests, accessible by rail and water from plaintiff's mill, the burden of proof rests on the defendant to establish that the plaintiff must have closed its mill business for want of logs, (not that it might have to do so), if the attachments had not issued.

V—CREDIT BAD, ERROR IN DEFENDANT'S BRIEF.

On p. 5 of defendant's brief near the bottom it is asserted that: "It was established by the evidence and not disputed that in September, 1897, the credit of the Bucki Company was very bad."

This statement is flagrantly untrue, and is based on the testimony of H. W. Simmons.

In the first place such testimony merely expressing the opinion of the witness, H. W. Simmons, that plaintiff's credit was bad in September, without showing that he had any knowledge of the assets and liabilities of plaintiff, was incompetent and illegal.

Rec. 86. His opinion was based on the fact that in July and August, some of plaintiff's drafts given for logs delivered went to protest, but "were taken up within a day or two, or so after the same was protested, except one draft for $5,340 given in August, which had not been paid Oct. 1."

The evidence in the Bill of Exceptions, presented by the plaintiff, fully explains that all drafts that were protested and paid between July 15 and August 15, were given on time, on the expectation that vessels would be chartered to remove the lumber, and enable the plaintiff to realize on its lumber, and that such vessels could not be obtained.

Such drafts did not go to protest, because of the want of ample assets, to-wit: lumber; but because of the unexpected emergency of want of vessels to remove and convert the same into cash. If the witness had not been a prejudiced and partial witness he would not have testified

that plaintiff's general credit was bad, because a few drafts went to protest, under the circumstances stated and of which he as an employee, is presumed to have known, which drafts were all immediately paid.

Such facts among impartial business men, would not seriously affect the general credit, of a business concern with knowledge that it had ample assets to meet all its liabilities, and continue in business.

As to the draft for $5,340, that was given August 19, and dated August 16, due ten days after date. It was held by the National Bank of Jacksonville, in Florida, and it is an undisputed fact that it was the only piece of matured commercial paper the plaintiff owed, on October 1.

It is also undisputed that $2,000 of that draft, was not for plaintiff's debt, but as an advance to the Atlantic Lumber Co. for logs to be delivered after August 16.

Although such draft matured August 26, the bank that held it manifested no concern about it, and cashed other paper of plaintiff, before it was paid, and that plaintiff had a setoff against it for $4,000.

On p. 188 of Record, the testimony of this witness is repeated.

On p. 86 he states that: "the company in September was unable to obtain loans from New York banks," and gives his opinion as to how much money plaintiff ought to have had to continue in business. And that the funds of the company were largely absorbed in paying a dividend declared in May, 1897. Rec. p. 87, near top.

But, the President of the plaintiff testifies, that the witness Simmons "had no authority to negotiate loans at the Bank of New York." Rec. 87 near top.

It certainly is no reflection on plaintiff's financial standing, that one of its employees was unable to obtain a loan from a bank, in New York, who had no authority to do so. Simmons was not what he pretended to be—the financial agent of the plaintiff. In respect to paying a dividend, (6 per cent. on $250,000), declared in May, it is obvious the dividend was declared when plaintiff was anticipating shipments of lumber to meet its liabilities.

While all business men know that if one is unfortunate enough to have a piece of its paper protested, banks, become suspicious of him, though he may have ample assets and his general credit not affected.

As against the opinion of Simmons, illegally allowed, we have, the undisputed evidence that, the plaintiff paid the contract price of all logs delivered, up to September 15, though for several months far below the guaranteed size; that, the A. L. Co. attached on October 1, for the installment of logs falling due, on that day, when plaintiff had the entire day to pay it in. And it is a conceded fact, on October 4, four days after the attachment, plaintiff paid on a writ of garnishment, a debt due one Schwaab, $2,500, and on October 11, paid its employees, $5,900—all it owed them, and continued in business and operation its mill until November 16, when all the logs on hand had been sawn up. And received on account of lumber shipped, $14,055.74, in October, $22,846.57, in November, and $2,483.63 in December, and had on hand 3,700,000 feet to be disposed of. Rec. 20, near top.

Besides, it had completed on September 30, a sale of boards for $25,000, the shipment of which was prevented by the writs of attachment, Rec. 72.

Again. "Testimony was adduced tending to prove that at no time prior to October 1 had the plaintiff been refused credit in Jacksonville, Fla., where it did business. Rec. 86, near bottom.

We submit therefore, that the testimony of Simmons is wholly untrustworthy, and utterly worthless, as testimony to establish the plaintiff's inability to continue in business, after October 1.

A fly on a wheel would be as ineffectual to prevent its revolving.

VI—ERROR IN DEFENDANT'S BRIEF.

On p. 42, of defendant's brief it is said: "The Bucki Company's position is, had we possessed sufficient credit, we could have borrowed the money necessary to continue business."

That statement is untrue.

There is not a word of testimony in the Record, to warrant such a statement.

Such was not and is not, plaintiff's position. Its position was and is that our personal assets, taken away wrongfully by the attachment, as good as gold at the market price, were ample to have enabled it to have continued in business—to say nothing of the general credit arising from the ownership of its mill plant costing $130,000, exclusive of ten acres of land in good condition, and not a lien on it.

VII—ERRORS OF FACT IN DEFENDANT'S BRIEF, PP. 56 AND 57, UNDER LETTER "B."

This is a statement of alleged facts and figures, claiming that plaintiff in cutting lumber on hand, October 1, and in cutting lumber sawn after October 1, up to November 16 lost, $10,000.

This is inexcusably untrue.

This statement avers that plaintiff shipped prior to December 28, all the lumber it had on hand Oct. 1, and all it manufactured afterward "except about 2,000,000 feet of old and second-class boards." Defendant's brief, p. 56, near bottom. The Record contains no evidence to support such an assertion.

Defendant's exception No. 14 1-2, Rec. p. 185, consisted of a refusal of the Court to give an instruction to the jury. Such instruction asserted that all the lumber plaintiff had on hand December 1 had been shipped "except about two million feet." But the Court refused to give such instruction.

The Bill of Exceptions states that all the lumber was shipped "except a portion of old lumber and second-class boards (not old and second-class boards), Rec. p. 200. It does not state that the second-class boards were old. Nor does it state the quantity of "old lumber and second-class boards," remaining on hand December 28 and not shipped.

But the bill of exceptions on p. 48, near middle of p. does state that the actual quantity of manufactured timber and lumber levied on October 1 was 5,200,000. It does state that between October 1 and November 16 there was manufactured 3,600,000, Rec. 62. Total 8,800,000.

The bill of exceptions does state there was shipped in October, November and December 5,120,358, Rec. p. 200.

Leaving balance on hand, 3,679,742.

There is no evidence in the Record to show the total amount at the selling prices, the 5,120,358 feet shipped, brought.

The bill of exceptions, p. 201, simply says that, plaintiff received on account of lumber shipped in October, November and December, $39,385.94. But it does not undertake to state the entire amount the 5,120,358 sold for—obviously it was much more than $39,385.94 for that sum would be only about $7.50 per M., whereas the logs cost $7.25 per M.

At $7.50 per M. plaintiff could not have made a profit of $5,000 per month, which the trial Judge certified; its books and testimony showed it did make.

Again, there is no evidence in the Record to show when the 3,679,742 feet were sold, or how much it brought—but even at cost of logs—would be $27,698.06.

Notwithstanding such undisputed facts, defendant's brief, p. 57, assumes that the total amount for which the 8,800,000 feet sold for was only $39,385.94.

To which defendant adds amount of bills received, $15,000, making $54,385.94.

Defendant then assumes that plaintiff's total indebtedness on October 1 (after operating its mill for 4 1-2 years), of $60,000, all arose while sawing the 8,800,000 (which represents its output for 3½ months at 2,500,000 feet per month), and deducts from $60,000, the $54,385.94 and calls the difference $10,000, as the cost of operating the mill in excess of its sale of lumber, Rec. 57.

Such a misstatement of facts and figures is nonsense, too transparent to mislead anybody.

Counsel seems to have forgotten that it is an undisputed fact, plaintiff had paid for all logs sawn up to November 16, except the deliveries made by the Atlantic Lumber Co. between September 14 and October 1, amounting to less than $8,000; that it had paid Schwaab October 5, $2,500, and the employees $5,900 on October 11, which was all that was due them, of $8,400, of the $60,000 liabilities. On October 1

$16,400, only remained unpaid, arising from operating its mill, and that the Court had certified the lumber on hand, was worth at least, $65,000, and its bills receivable $15,000, and had made a net profit in nine or twelve months of $5,000 per month, Rec. 68, 82.

The timber on hand,	$65,000
Bills received	15,000
Total	$80,000

After paying the said $8,400, its liabilities were $63,000—$8,400=$54,600, of this $2,000 was an advance in the draft of $5,340, which reduced its liabilities to $52,600, which deducted from $80,000, leaves $27,400, which would represent the profit made in three and a half months of its business, less taxes, insurance, and repairs, and undoubtedly 8,800,000 feet, 2-3 of it square timber actually sold for much more than $65,000 as that would be less than $7.50 per M., or only $.25 more than the logs cost.

Anyone looking at the current prices of square timber and first-class boards, during the year 1897, can know that the market price of such stuff was $10 to $12 per M.

The defendant's misstatements of facts are futile to overcome the evidence of the books of the plaintiff, establishing a profit of $5,000 per month prior to October 1, although owing to want of room to pile lumber, the mill had to be shut down during a part of August and September.

VIII—ERROR OF DEFENDANT, COUNSEL FEES.

On p. 34 of its brief, the defendant makes the point that plaintiff's motion to dissolve the attachment for $75,000 involved some of the same issues that were raised by the pleadings on the merits; that on the pleadings on the merits, the issues were substantially made up before the motion to dissolve was tried, and that plaintiff ought to have waited until the parties were prepared to go to trial on the merits, and until the Court had reached the case for trial on the merits. And that the trial of the motion,

in advance of the action on the merits unnecessarily caused the services of counsel on the motion and therefore plaintiff ought not to be compensated for such counsel fees. The motion was made months before such issues were made up. To such a suggestion or contention, there are several complete answers.

1st. It would completely nullify the statute providing that the courts shall be always open to hear motions to dissolve attachments and nullify the policy of the law to give a speedy hearing in such cases.

2d. Although the issues on the merits might be made up at the time of trial of the motion, yet it might be months or a year before the case would be reached in its order, on the trial docket, or before the parties were ready for trial on the merits, and in the meantime, the pending of the attachments would ruin the defendant in attachment.

3d. The issues on the motion and on the merits, were not, and rarely ever, could be the same. On issue of indebtedness, on merits, plaintiff would recover if he proved any debt, no matter how small; but on such an issue on the motion it would be only necessary for the defendant to establish that the amount due was substantially less than the amount of the attachment,

4th. In the case at bar, another distinct action was consolidated, with the action in which the auxiliary writ for $75,000 was issued; and the issues on the merits of the former action had no connection whatever, with the issues on the motion to dissolve in the latter.

5th. Counsel cites Western vs. Jones, 41 Fla. 188 (not 241), That was a case for a preclosure of a mortgage lien, in which a general attachment had been issued. The Court decided that such an attachment was not authorized by the statute. But also rendered that in a common law action, it was error for the trial Court to refuse to order formal pleading to be made up, so that the issues on the merits and on the motion could be tried together. The Court did not rule that such issues must be tried together.

Besides having decided that the writ was illegal in a foreclosure case, it had no occasion to decide anything else,

and what it said about making up the issues on the merits was a mere dictum.

That case was decided two years after the motion to dissolve the $75,000 writ, was heard, and the Federal Court had a perfect right to direct the time when the motion should be heard, there being no local law to the contrary.

6th. The fact that subsequently on the trial of the merits some of the same questions arose, that had previously arisen, on the trial of the motion to dissolve, necessarily does not affect the right to counsel fees.

If defendant chose to recontest points previously decided, it was its own fault.

CONCLUSION.

The three important ultimate facts in this action are:

1st. The plaintiff successfully did business at a good profit for four and a half years.

2d. The writs of attachment interrupted and destroyed that business.

3d. That plaintiff was able on October 1, 1897, to continue in business, if the attachments had not been issued.

H. Bisbee
for plaintiff

Supreme Court of the United States.

No. 220.—October Term, 1902.

The Fidelity and Deposit Company of Maryland
vs.
The L. Bucki & Son Lumber Company.

On writ and cross-writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[April 6, 1903.]

On October 1, 1897, the Atlantic Lumber Company commenced two actions at law in the Circuit Court of Duval County, Florida, against The L. Bucki & Son Lumber Company. In each of these actions a writ of attachment was issued, The Fidelity and Deposit Company of Maryland being the surety on the attachment bonds. Both of the attachments were dissolved. Soon after such dissolution the Bucki Company brought the present action against The Fidelity Company upon the attachment bonds. The action was commenced in the Circuit Court of Duval County, Florida, but subsequently removed to the United States Circuit Court for the Southern District of Florida. On a trial in that court the Bucki Company obtained a judgment which by the Court of Appeals of the Fifth Circuit was modified, and as modified affirmed. (109 Fed. Rep. 393; 48 C. C. A. 436.) Subsequently thereto each of the parties obtained a writ of certiorari from this court. (184 U. S. 698.)

Mr. Justice Brewer delivered the opinion of the Court.

The principal question arises in the claim to recover counsel fees incurred in securing the dissolution of the attachments. The reasonable value of such fees was specially found by the jury to have been $7,500. The Circuit Court refused to include this in its judgment, but the Court of Appeals ruled otherwise, and ordered judgment for that sum in addition to the amount of the general verdict.

By the law of Florida counsel fees incurred in securing the dissolution of an attachment are recoverable in actions upon attachment bonds. This was distinctly ruled in *Gonzales* v. *De Funiak Havana Tobacco Company*, (41 Fla. 471,) in which the second headnote recites that "attorney's fees and other expenses incurred in relation to the attachment, or in procuring its dissolution, are properly allowed as elements of damage in actions upon attachment bonds." And this is conclusive, for by McClellan's Dig. 345, sec. 21, it is provided that "the judges of the

Supreme Court of this State shall, in deciding cases, prepare and make a syllabus or statement of the points and principles intended to be decided by the court, which shall be published in the reports in lieu of that usually prepared by the reporter." (*Hart., Ex., et al.* v. *Stribling et ux.*, 25 Fla. 435.) It is true, as contended by counsel, that the case in 41 Fla. was not decided until after the bonds sued on in this case had been executed, but the decision declares the law of the State, and that, in the absence of statutes affecting the question, must be taken to have been always the law. And in its opinion the court refers as authority, among other cases, to *Wittich* v. *O'Neal*, 22 Fla. 592, 599, (decided in 1886,) in which it was held that "in a suit on the bond given to obtain a temporary injunction, counsel fees incurred by the defendant in the suit to dissolve such injunction are damages that may be recovered if covered by language of the bond." In the opinion in that case the court, while conceding that other appellate courts had ruled differently, (among them this court in *Oelrichs* v. *Spain*, 15 Wall. 211,) declined to follow such ruling, and said:

"It seems just and right that where a party asks the interposition of the power of the courts, in advance of a trial of the merits of the cause, to deprive the defendant of some right or privilege claimed by him, even though temporarily, that, if on investigation it is found that the plaintiff had no just right either in the law or the facts to justify him in asking and obtaining from the court such a harsh and drastic exercise of its authority, he should indemnify the defendant in the language of his bond for 'all damages he might sustain,' and that *reasonable* counsel fees necessary to the recovering of such injunction are properly a part of his damage."

The promise in the bonds sued on here is like that referred to in the language just quoted, and was "to pay all costs and damages which the said L. Bucki Lumber Company may sustain in consequence of it, the said Atlantic Company's improperly suing out said attachment." Liability for these counsel fees being, as declared by its highest court, a part of the the obligation assumed by the obligor in an attachment bond given in the courts of Florida, should be enforced in every court in which an action on such a bond is brought. This action was commenced in a Circuit Court of the State, and if it had proceeded there to judgment unquestionably a liability for counsel fees would have been sustained, and it cannot be that by removing the case to the Federal court such liability has been taken away. In *Tulloch* v. *Mulvane*, (184 U. S. 497, 505,) we held that when a bond had been given in a case pending in the Federal court and an action was thereafter brought in the State court on such bond, the rule of liability was that existing in the Federal court in which the bond was given, and said:

"It is clear that if it be true that the bond given in a Federal court of equity on the granting of an injunction is not be construed with reference to the rules of law applicable to such bonds in such court, then there can be no certain general rule by which to determine the liability of the obligors

upon the bond. Their responsibility would be one thing in a court of the United States and a different thing in the courts of the various States, which would imply that the parties did not contract with reference to any definite rule of liability." See also *Missouri, Kansas &c. Railway Company* v. *Elliott*, (184 U. S. 530.)

In reference to the other alleged errors, the Court of Appeals, without referring to them in particular, said, "on the fullest consideration of the whole case we conclude that the record presents no error on the part of the trial judge for which the judgment should be reversed."

We do not wonder at this observation of the Court of Appeals, as we find from the record that the plaintiff filed in that court thirty-seven assignments of error covering seventeen printed pages, and the defendant thirty-nine such assignments. It may be true, as the Scriptures have it, that "in the multitude of counsellors there is safety," but it is also true that in a multitude of assignments of error there is danger.

Perhaps it is well to first briefly outline the case and the testimony. Prior to October, 1897, the Atlantic Company had under contract been engaged in furnishing the Bucki Company with logs with which to operate its sawmils, at the rate of 2,000,000 feet per month. It canceled its contract on account of an alleged breach by the Bucki Company and brought the two actions at law, one for $200,000 damages, resulting from such breach, and the other for $9,980.80, claimed to be due for logs delivered, and in these actions sued out the two attachments. They were levied upon the mill plant, the logs, lumber, and all other personal property of the Bucki Company. While the personal property was taken into possession by the sheriff, the mill was a fixture, a part of the realty, and the writs did not operate to disposses the Bucki Company therefrom, but simply established a lien upon it. By forthcoming bonds the personal property was, after a few days, released, and subsequently the attachments were dissolved. On the trial the plaintiff was permitted to show the extent of its mill plant, the amount of business it had been doing in prior years, the net profits of such business during the nine or ten months preceding the levy of the attachments, the orders and contracts which it had on hand for timber and lumber, an alleged increase in the price of timber in the year succeeding the levy; there was testimony bearing upon the question of its ability to get logs elsewhere, the means of transporting them to its plant, and the existence of negotiations for a loan of money secured by the material it then had on hand. There was evidence also tending to show the financial condition of the company, its default in certain payments and efforts it made to utilize its property subsequently to the attachments. After all the testimony had been presented the defendant made a motion in writing to exclude a number of items thereof from the consideration of the jury, upon which motion the court ruled as follows:

"This cause coming on to be heard on a motion of the defendant's attorney to exclude certain testimony from the jury, and it being considered that under the testimony introduced, any damages arising from the consideration of injury to credit or loss of profits would be too remote, uncertain and speculative, it is therefore ordered that this motion be granted as to the testimony relating to the cost of manufacturing lumber and the supply of timber lands; all testimony to the damage to credit, loss of profits and all evidence relative to the market prices of lumber subsequent to the attachment. That in regard to the profits plaintiff's mill had been making prior to October ., 1897, be retained and considered only for the purpose of determining the actual damages suffered during the time the operation of the mill was suspended on account of the attachment and the motion be denied in all other respects."

And in making this ruling it said:

"This order is made at this time only for the purpose of confining the argument to the jury upon these lines. I am fully satisfied in my own mind that damages from the loss of profits arising from the subsequent or future business which might possibly have been carried on is under the evidence too remote and speculative for the testimony to go to the jury. Some courts have held that every fact should go to the jury to be considered, but the United States courts have uniformly held that where the testimony is such that any reasonable man, or any reasonable court could view it in but one light, the court may exclude it from the jury. In this matter I have admitted the testimony, but I fail to find that there is such evidence of damage from loss of future profits as should go to the jury. If there was no combination of circumstances other than the attachment; had a third party come in and levied an attachment and stopped the business, and there had been no suspension save by the attachment, then there might have been such testimony as would prove a loss of profits; but in this case the particular circumstances, the suspension of the contract for the delivery of logs and the bringing of the two common-law suits, so changed the circumstances that there is no certainty that there could have been any profit.

"Every author of authority referred to, even by the plaintiff's attorney, says there must be some certainty.

"Now the certainty of profits here depends upon this: It is claimed that on account of these attachments the plaintiff's credit was injured; that had it not been for the attachments, money could have been borrowed, timber land or stumpage could have been procured, logs could have been procured profitably; if logs could have procured profitably, lumber could have been manufactured and marketed profitably. Now, between the borrowing of the money and the marketing of the lumber there are so many uncertainties that the court cannot say that there is sufficient to justify the jury in finding perhaps large damages against the defendant in this case on account of loss of credit and profit—from the levying of the attachments."

The plaintiff excepted on the ground of an invasion of the province of the jury, and because it was, as it alleged, misled by the rulings of the court in admitting such testimony, and therefore failed to introduce other testimony which it claimed to possess and which upon another theory would

have tended to show the damages it had sustained. Because it was so misled it also filed a motion to discharge the jury and postpone the trial of the case, which motion was denied and the case submitted to the jury. Many instructions were asked by counsel on both sides looking to the question of damages and exceptions were taken to the refusal of the court to give those instructions. In its general charge the court said:

"The only question is a clear-cut question; it is how much damages did the Bucki Company suffer. This question becomes more difficult by reason of facts and circumstances attending the writs of attachment. At the time the writs of attachment were levied there were two common-law suits commenced, both of which have been terminated. That is one attending circumstance. The other is that the Atlantic Lumber Company cancelled its contract or considered it cancelled. That is, the Atlantic Company refused and ceased to deliver any more logs to the Bucki Company. So that the three combining circumstances, the levy of the writs of attachment, the ceasing to furnish logs and the common-law suits unite in being the cause for subsequent suffering of damage by the Bucki Company.

* * * * * *

"But in this case the attachment did not cause the stoppage of the furnishing of logs, nor did the issuing of the attachment cause the institution of the common-law suits.

* * * * * *

"I have therefore, as you have seen in the course of the case, granted a motion to exclude from your consideration all testimony as to damages for loss of credit and all testimony as to all profits the Bucki Company might have made in the future in procuring capital, in procuring lands, in procuring logging plants and procuring logs, at a profit, and so manufacturing lumber therefrom at a profit.

* * * * * *

"I therefore instruct you gentlemen that the damage must be confined to the damages suffered by the detention of the mill for the time being; those damages that have arisen by the detention of and taking the mill properties from the possession of the plaintiff."

Without further quotations, enough appears to show the general scope of the rulings of the court in reference to the measure of damages, and even conceding that its action, as said by the Court of Appeals, "is, in several particulars, subject to the criticism which is levelled at it by some of the other numerous assignments of error," we are of opinion that there was no such substantial error as justifies a reversal of the judgment. That there may be such certainty of profits as in some actions for breach of contract will justify their recovery is undoubtedly true. (*Howard* v. *Stillwell & Bierce Manufacturing Company*, 139 U. S. 199, 206; *Cincinnati Gas Company* v. *Western Siemens Company*, 152 U. S. 200; *Anvil Mining Company* v. *Humble*, 153 U. S. 540, 549.) If this action had been one by the Bucki Company against the Atlantic Company to recover damages for a breach of its contract to deliver logs, the inquiry as to profits might have been broader than was permitted in the present case.

But, as pointed out in the charge of the court, the failure of the Atlantic Company to further deliver logs was not caused by or the direct result of the attachments. By signing these bonds the surety did not agree to become responsible for all the damages which the Bucki Company might sustain by every act of the Atlantic Company, but simply that it would be responsible for the damages resulting directly from the attachments. The direct result of the attachments was the placing of a lien upon the realty, and for a certain time interrupting the Bucki Company's business by taking possession of its personal property, and the damages which resulted directly from these alone were the damages which the surety company agreed to become responsible for. The court very properly admitted in evidence, and permitted the jury to consider the net profits which had been earned from the carrying on of the business in the few months prior, not as in and of itself constituting the measure of damages, but as tending to show what damages the Bucki Company sustained by the brief interruption of its business. When the lien on the realty was ended and the personal property restored, the attachments had spent their force and the surety company became responsible for all the damages attributable directly to the attachments. The failure to further deliver logs, and the reflection on the credit of the Bucki Company by the bringing of the actions may also have damaged or added to the damages of the Bucki Company, but such result was not due to the attachments. The Atlantic Company and not the surety company was the party responsible therefor.

Neither can we see that there was error in refusing to discharge the jury and postpone the trial. A postponement or continuance is largely within the discretion of the trial court, and unless that discretion is shown to have been abused there is no sufficient ground for reversal. It does not appear that any witness had been discharged or any books or documents in possession of the counsel sent away during the trial, and there was no offer then and there to present further testimony. It does not seem to us that the Bucki Company was prejudiced by the ruling of the court in this respect.

The liability for counsel fees and the true measure of damages are the main questions in the case. This latter question was presented in different forms and with various limitations, but we think the rulings of the trial court thereon were substantially correct. We see no error in the record which justifies a reversal of the judgment, and it is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.